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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

ROBERT MIELL,

Defendant.

ROBERT MIELL,

Third-Party Plaintiff,

vs.

BRET THROLSON and BRET THROLSON
AGENCY, INC.,

Third-Party Defendants.

No. 04-CV-142

EXCERPTS FROM THE JURY TRIAL HELD
BEFORE THE HONORABLE JON STUART SCOLES,

taken at the Federal Building, 101 First Street SE,
Cedar Rapids, Iowa, on the 9th and 11th day of January,
2008, reported by Kay C. Carr, Certified Shorthand
Reporter in and for the State of Iowa.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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APPEARANCES:

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behalf of the Third-Party Defendants.

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
PLAINTIFF'S:					
Robert Niell (Offer of Proof)	36				37

E X H I B I T S

EXHIBITS	OFFERED	RECEIVED
PLAINTIFF'S:		
246	54	54
247	54	54
248	54	54
249	54	54
DEFENDANT'S:		
D-1	57	57

(This begins the requested, excerpted
portion of the record.)

(In open court, outside the presence of the
jury.)

THE COURT: Let the record reflect that we're in
the courtroom and outside the presence of the jury. All
counsel are present. The purpose of this record is to
address the issue of the 404(b) issues that were
previously raised in Defendant's Motion in Limine. The
file will reflect that the Court entered a ruling in that
regard on January 2, 2008. The Court's ruling -- in fact,
I'll just read a couple sentences from it. It says, "As
set forth above, the Court has concluded that American
Family may introduce evidence regarding other wrongful
acts if it can establish by a preponderance of the
evidence that the acts are relevant to the issue of
Niell's intent to deceive and are similar in kind and
close in time to the events at issue in this case, and
that the probative value of the evidence is higher than
its prejudicial effect. Generally, it is anticipated
that evidence of Niell's preparation of forged repair
bills and similar documents will be admissible."

So it was the Court's intention -- and as I
indicated in my order -- evidence relating to so-called
prior bad acts or other bad acts which are similar in kind

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1 and close in time to these events are admissible. By
 2 similar in kind, I guess I was primarily thinking of the
 3 claims, as I understood them, with respect to Mr. Niell's
 4 activities in association with damage deposit returns.
 5 That is, it's my understanding that he provided renters
 6 with forged or phony damage invoices and things of that
 7 sort in order to improperly retain their damage deposits.
 8 Because those involve documents which have been fabricated
 9 by Mr. Niell in an attempt to essentially defraud another
 10 party for financial gain, those are similar in kind, and
 11 assuming they're close in time, and further the evidence
 12 can be established by a preponderance of the evidence, the
 13 Court concludes that those would be admissible.

14 It's my understanding from the proffer
 15 yesterday, however, that there are more activities that
 16 Defendant engaged in that would be generally described as
 17 fraudulent, and so the purpose of this hearing is to allow
 18 Plaintiff to make a proffer as to what that evidence is
 19 and listen to argument of counsel as to whether or not
 20 it's admissible.

21 Mr. May or Mr. Proctor?

22 MR. PROCTOR: It will be Mr. May.

23 MR. MAY: Your Honor, I would like to just start
 24 out by being very clear about the fact of why we want to
 25 offer this evidence. As the Court properly pointed out

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1 on?

2 MR. MAY: Yeah. We do have some of those
 3 documents and I'm just going to have to apologize, Your
 4 Honor, that I don't have them in front of me. I've got
 5 witnesses that have seen him use other notary stamps.

6 THE COURT: The purpose of the hearing today is
 7 to be a little more specific exactly what evidence you
 8 intended to offer to determine whether it's similar in
 9 kind to what we're talking about here.

10 MR. MAY: And I apologize. I know that I've got
 11 witnesses that are going to say that he used a notary
 12 stamp for someone else -- with somebody else's name.

13 THE COURT: For all I know, that means that
 14 someone was, you know -- I don't know what; doing
 15 something that they needed a -- their signature notarized
 16 and he used -- and if he used someone else's stamp, that's
 17 improper, fraudulent, maybe unlawful; a variety of things,
 18 but if it's not in the context of what we're talking about
 19 here, then it doesn't meet the similar in kind
 20 requirement. I mean it could have been notarizing
 21 someone's signature or his signature on a passport
 22 application. Based on what you told me, there's no way I
 23 can determine it's similar in kind to the allegations of
 24 fraud in this case.

25 MR. MAY: Your Honor, I understand exactly what

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1 yesterday, we're not just -- we're not trying to show
 2 Niell as a bad guy and, therefore, he did something bad
 3 this time. We're trying to show his intent, motive, and
 4 his knowledge of basically forging documents in other
 5 contexts and how that plays into what he did here. And I
 6 outlined for the Court several categories and I don't want
 7 to re-plow the field too much and waste your time, but I
 8 would say I would just go through and briefly say when we
 9 talk about him using someone else's notary stamp -- and
 10 this would be evidence that would be in the same time
 11 frame. In other words, we're talking about in the early
 12 2000s, if you will; you know, that's a fraudulent document
 13 situation. Where he signs R. Gordan Sergeant's name --

14 THE COURT: Let's be more specific with respect
 15 to the notary stamp. Specifically, what would the
 16 evidence be if I allowed it? Can you tell me when and
 17 what documents and for what purposes these were used?

18 MR. MAY: I can tell you that -- that what we
 19 would ask Mr. Niell about -- what we would ask him about
 20 is whether in 2001, 2002, 2003 he had ever used a notary
 21 stamp with somebody else's name on it. Now, the purpose
 22 of using that, of course, is to falsify the fact that
 23 there was a notary standing there at the time. It would
 24 be a situation where --

25 THE COURT: Do you know what document he used it

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1 you're saying. I guess my -- I won't say it a million
 2 times. I think of similar in kind of being if you're
 3 forging documents and I understand your point. I'm not
 4 trying to argue with you.

5 THE COURT: Essentially, your theory is that
 6 because the allegation here is fraud, that any fraud is
 7 similar in kind.

8 MR. MAY: No, Your Honor. We will -- that would
 9 be the broad stance because I've got one extra fraud, but
 10 if I abandon that stance, I still have several things
 11 where it's fraud and manipulating documents and that's my
 12 theory. But if you'll just bear with me.

13 THE COURT: What's the next item?

14 MR. MAY: Well, R. Gordan Sergeant. And the
 15 evidence here would be that R. Gordan Sergeant is an
 16 imaginary person whom Mr. Niell used this name as
 17 basically to mislead renters into thinking that R. Gordan
 18 Sergeant was a -- the owner of the buildings or, you know,
 19 that's the person that people have to go to with any of
 20 their problems. There's going to be evidence that he
 21 wanted them to sue R. Gordan Sergeant instead of him and
 22 that he had a stamp made up with R. Gordan Sergeant's name
 23 on it and he would use that stamp and that it was used in
 24 the -- in the office.

25 THE COURT: Stamped on what?

1 MR. MAY: Documents that were used in connection
2 with tenants.

3 THE COURT: So when a lease was entered into, he
4 would stamp Mr. Sergeant's signature on a lease or I guess
5 I'm unclear as to what other claim -- if a notice was sent
6 out saying you're not getting your damage deposit back,
7 would he use Mr. Sergeant's name there?

8 MR. MAY: I wish I could be more specific with
9 you right now, Your Honor, and I just don't have the
10 answer to your question and I'll probably just bring it
11 back up before I try to offer that because I just have to
12 ask a witness. He's going to be here at one o'clock
13 today.

14 THE COURT: I guess you can bring it back up,
15 although again, that's why we came an hour early this
16 morning was to try to address these issues. Yesterday,
17 there was testimony regarding a J. J. McManus and that
18 evidence was properly admitted because that name appeared
19 on a Home Doctor bill and that Home Doctor bill was
20 submitted in connection with these losses and, therefore,
21 it was perfectly legitimate. The suggestion at that time
22 was that there is no J. J. McManus. Frankly, I hope for
23 Mr. Niell's sake that there is because I'm assuming the
24 Government is going to check that out and if there isn't a
25 J. J. McManus, I think he's probably opened himself up to

1 however, unless R. Gordon Sergeant's name is somehow
2 either associated with this case other than simply being
3 listed as an officer in one of Mr. Niell's companies. For
4 example, his name appears on one of the documents
5 someplace or if there's some other document that's similar
6 in kind, like some sort of letter to a tenant saying you
7 don't get your damage deposit back because we had to do
8 these repairs and here's an invoice and it turns out that
9 invoice is false, that kind of testimony would be
10 admissible. And if Mr. Sergeant is somehow identified
11 with that, then that would come out and so forth, but the
12 mere fact that there may be another imaginary party out
13 there; a person out there I don't think is the similar in
14 kind or meets the similar in kind requirement that's
15 anticipated by the cases.

16 MR. MAY: And, Your Honor, I understand
17 everything you just said, and the only reason I hesitate
18 to say exactly what documents I'm fairly sure what the
19 testimony would be is -- well, first of all, I don't know
20 what Mr. Niell would say if we had him on the stand. I
21 would like to believe he would admit to using the
22 R. Gordon Sergeant, but I think that the other witnesses
23 that we have would say that it had to do with leases at a
24 minimum and that doesn't sound like it meets what you have
25 in mind.

1 a perjury charge because he testified unequivocally that
2 J. J. McManus does exist.

3 Having said that, however, even if, you know, we
4 think that there's a R. Gordon Sergeant out there, it's
5 somehow in my belief got to be tied into -- to what we're
6 talking about here. It's -- it's not enough -- in fact, I
7 think that's the whole thrust of 404(b) is you don't just
8 throw in a bunch of bad things about somebody so that the
9 jury can conclude he's a bad guy and, therefore, probably
10 did bad things here. It's got to be similar in kind to
11 the kind of fraud that is alleged in this case.

12 MR. PROCTOR: Judge, unless my memory is
13 failing, R. Gordon was president of at least Equity
14 Associates. Mr. Riley can correct me if I'm wrong, but
15 that's where R. Gordon Sergeant fits into the
16 performance. You see from the faxes we went over, they
17 came from Equity Associates, which again, I believe the
18 testimony in the deposition was that R. Gordon Sergeant
19 was at one time the president of that company while all of
20 this was going -- going on.

21 THE COURT: And again, if there is no
22 Mr. Sergeant, that's clearly fraud and if he submitted
23 documents with the Secretary of State which identify an
24 imaginary person, he's probably exposed himself to
25 additional criminal charges. I mean it's all bad stuff;

1 THE COURT: Even if Mr. Niell would admit that
2 evidence, that's sort of the second part of the analysis
3 or one of the parts of the analysis. In order to be
4 admissible, first, the Court has to find that it's similar
5 in kind and close in time. And then the offer has to be
6 able to prove it by a preponderance of the evidence. Now,
7 if I find that it's similar in kind and close in time and,
8 therefore, admissible, then it might be that you can prove
9 it by his admissions and if he fails to admit it, then you
10 would have to prove it by some other means. But if -- if
11 it's not similar in kind and close in time, then whether
12 he would admit it doesn't get you home.

13 MR. MAY: I would like to just raise one other
14 issue, Judge, and it's that yesterday, when Mr. Niell was
15 up on the stand, he was talking about his motivation in
16 this case and his motivation for fixing roofs and he said
17 that that was for the good of his tenants. And he was
18 trying to convince the jury at that point what a good guy
19 he was with regard to his tenants and I think that weighs
20 in favor of our other evidence regarding how he treats his
21 tenants.

22 THE COURT: What's the third item?

23 MR. RILEY: Your Honor, I hate to interrupt, but
24 there is something I would like to say about that brief
25 comment. I can wait until later.

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1 THE COURT: Go ahead.

2 MR. RILEY: I think the testimony was in
3 relation to the roofs that had to be fixed before the
4 matter was fully adjusted because those roofs were
5 leaking. I don't think there was a broad claim of I'm
6 doing this for the good of my tenants. Not that that
7 makes any difference in my view, but that was my
8 recollection of the testimony.

9 THE COURT: Item No. 3?

10 MR. MAY: Rich Shanstrom is a name the jury is
11 already familiar with and -- well, I skipped. John
12 McManus we've already dealt with. Rich Shanstrom, the
13 jury already heard about him. He's the one that brought
14 this up to -- this whole scheme to the attention of the
15 fraud division and Mr. Shanstrom would say that Mr. Niell
16 sent him an inflated 1099 and that it was an effort --
17 well, and I don't know that Rich would say it, but what
18 could be inferred was Mr. Niell was trying to benefit
19 twice from the scheme. Not only does he not spend the
20 money on the roofs, but he gets a tax benefit as if he had
21 spent the money on the roofs.

22 THE COURT: And my recollection of the
23 testimony, or maybe it was during opening statements, but
24 there's sort of an inference that Mr. Shanstrom may have
25 had some sort of improper motive in reporting all of that

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1 extent can you go into matters that are collateral, and
2 when Mr. Niell denies that he gave an inflated 1099 to
3 Mr. Shanstrom -- which he will do -- do they take the
4 answer or are they entitled then to try to impeach him or
5 wait until Mr. Shanstrom testifies. I'm curious about
6 that there may be some additional documents brought down
7 to the courthouse.

8 THE COURT: Well, I'm assuming that it appears
9 that the parties are in agreement that testimony regarding
10 Mr. Shanstrom and his role in that whole process is going
11 to be admissible and that will include what 1099s he got
12 from Mr. Niell and whether or not they were accurate and
13 all the rest of it. I don't think it's necessary for the
14 Plaintiff to wait until Mr. Shanstrom testifies here's my
15 1099 and it was inflated and then call Mr. Niell back and
16 ask him whether he admits that. I think they can ask him
17 during his direct examination whether or not the 1099 that
18 he issued to Mr. Shanstrom was accurate and if he says it
19 is, then that's what he says and then the Plaintiffs are
20 going to be put to some proof to establish it's something
21 else, presumably by Mr. Shanstrom's testimony.

22 What's the fourth item? Mr. McManus was No. 3.
23 Mr. Shanstrom was No. 4.

24 What's the fifth item?

25 MR. MAY: Your Honor, the fifth item had to do

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1 or something to that effect and it would seem like issues
2 relating to Mr. Shanstrom would then be admissible with
3 respect to what his motive may or may not have been.

4 So, Mr. Riley, how do you respond to the
5 argument that Mr. Shanstrom is more directly related to
6 the issues in this case; that is, specifically, it was a
7 claim he had done some work on the houses. That was
8 false. Mr. Shanstrom would be able to testify that he
9 didn't do any work on the houses and then apparently you
10 would be asked whether or not he got a 1099 that reflected
11 that.

12 MR. RILEY: First of all, Your Honor, we look
13 forward to talking about Mr. Shanstrom in great detail.
14 Obviously, Mr. Shanstrom is going to talk about how he
15 told the investigator no, I didn't work on this house,
16 this house, this house and that's clearly proper.

17 With respect to the issue of Mr. Shanstrom
18 saying I had tax problems because of inflated 1099s that
19 Mr. Niell submitted to the government, I would agree,
20 No. 1, that that would go to the issue of his motive and,
21 No. 2, we look forward to going into that evidence in
22 great detail. So I don't have a problem with that.

23 But I do want to raise a procedural issue as it
24 relates to the questioning of Mr. Niell on that point,
25 because that gets into the question of the matters to what

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1 with the bat cave and the bat cave -- as I recall,
2 Mr. Niell told us in his deposition that it was the cave.
3 I don't think he was willing to own up to the bat cave and
4 I told you yesterday that's a situation where Mr. Niell
5 would have taken tenants property, put it in the bat cave
6 and then in certain instances, tell the tenant that,
7 "Well, I guess somebody stole your property. I don't
8 know where it is."

9 THE COURT: This is when someone moves out or is
10 evicted? He empties the apartment, stores it
11 someplace -- if you want to call it a cave -- and then
12 lies about it to the tenant when he's asked about it?

13 MR. MAY: Yeah. And that's what we would ask
14 about.

15 THE COURT: And again, I think that shows that
16 Mr. Niell is a bad guy if that's true, but I don't think
17 it's similar in kind to the type of fraud that we're
18 talking about here.

19 MR. MAY: Would you like me to move on to the
20 next one?

21 THE COURT: Yes. No. 6.

22 MR. MAY: The next one -- and this again, Your
23 Honor -- this is about a document that he asked Teri
24 Sparks to sign that tried to force Teri Sparks, an
25 employee, to sign a confession of something that she

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1 didn't do and that was the whole calling the employees
2 circus animals.

3 THE COURT: Can you give me more detail of what
4 that's all about?

5 MR. MAY: Yeah. I didn't want to try to waste
6 your time. I had a feeling I knew what you were going to
7 say about it. Apparently, what Teri is going to testify
8 to is some of the staff had thought that Bob had called
9 them circus animals.

10 THE COURT: Like what? Like --

11 MR. MAY: The -- the staff is a bunch of circus
12 animals. Not like elephant or rhino. Just circus animals
13 in a generic sense.

14 THE COURT: So in speaking with other people, he
15 said, "My staff are a bunch of circus animals."

16 MR. MAY: Yeah, circus animals, and apparently
17 what Mr. Niell tried to do was pin that on Teri Sparks.
18 No, it was Teri and then tried to get Teri to sign a
19 confession that, you know, I apologize for calling the
20 staff circus animals and that's why she quit. And it was
21 actually litigated, the whole issue, in the -- because she
22 went for unemployment benefits and ultimately it was --
23 there was a credibility determination made between her and
24 Mr. Niell and she was found to be more credible and the
25 Iowa Court of Appeals said there was evidence to support

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1 What's the seventh item?

2 MR. MAY: This is more of a generic setting
3 where the best I can give you is that Bob was overheard to
4 say that he would ask his employees to sign his name so he
5 could later accuse them of having forged it if things went
6 badly. In other words, to basically turn around, sign my
7 name for me in this context.

8 THE COURT: Is there any evidence that any of
9 his employees ever signed his name?

10 MR. MAY: His statement that that's what he
11 did. Yeah, it would be hearsay. His statement outside of
12 the court. I mean it's his admission and somebody heard
13 him say it. I don't have a piece of paper, if that's what
14 you're asking for, Your Honor.

15 THE COURT: And who would testify that they
16 heard him say to somebody else -- I guess I'm not sure
17 who's testifying as to this.

18 MR. MAY: Yeah. Lisa Waggoner would say she
19 heard Bob say that.

20 THE COURT: So Bob told Lisa, "I'm going to have
21 other people sign my name so that later on I can say I
22 didn't sign it." They signed it or something to that
23 effect?

24 MR. MAY: Or Bob is talking to somebody and Lisa
25 was there. They were not just employees. They lived

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1 that finding so, you know, I guess it just goes back to
2 this idea that this is somebody who is happy to use
3 documents to commit fraud in lots of contexts and this is
4 not a one-time thing just because we stuck a one year
5 deadline on it.

6 THE COURT: It sounds like kind of a bizarre
7 episode, but I guess I'm not sure how it would apply
8 here. The only possible application, there was testimony
9 about him meeting with -- I can't remember if it was Lisa
10 Waggoner or someone and had them sign a confession that
11 they had taken some stuff from his office and I don't know
12 if it's claimed that that happened; if the Plaintiff says
13 yeah, that did happen and -- or what the Plaintiff's
14 position is as to whether or not that was a true
15 confession or if it did happen or what that's all about.

16 But theoretically, I suppose if the Plaintiffs
17 offered testimony that -- from Lisa Waggoner that I was
18 forced to sign this false confession, it wasn't true, but
19 I did it because I was pressured and so forth and so on
20 and -- and Mr. Niell denies that, then theoretically, if
21 there was another circumstance where he forced a false
22 confession, that might be relevant. But absent that, the
23 fact that there's this episode regarding circus animals I
24 don't think has much to do with what we're doing here
25 today.

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1 together for a while.

2 THE COURT: But unless there's some -- so far I
3 don't think he's denied his signature on any of these
4 documents or signing any of these items, and unless at
5 some point he says, "I didn't sign that. That's not my
6 signature," then the issue of whether or not, in fact, he
7 signed it and whether or not he had the scheme out there
8 where he would have other people sign so he could deny it,
9 maybe that becomes relevant. But unless his signature is
10 called into question, I think it has really little or no
11 probative value.

12 MR. MAY: Okay.

13 THE COURT: And so I wouldn't be inclined to do
14 that.

15 MR. MAY: The last issue I want to bring up, and
16 I think this is probably one -- something that would be
17 the most helpful to the jury at this stage is something
18 called whiteout Tuesday. And the evidence will be that
19 what Mr. Niell would do is when he was getting ready --
20 Tuesday apparently is the day to go down for small claims
21 for tenants or at least at one point it was. And that he
22 would take leases and other documents over to the
23 photocopier and he would white out the portions that he
24 wanted to white out to try to hide and then he would
25 photocopy and then present that as -- as the original. In

1 other words, alteration of documents for the purpose of
2 winning lawsuits.

3 THE COURT: The documents would be --

4 MR. MAY: Leases is one example. Now, where is
5 that exhibit? Your Honor, when I deposed Mr. Niell about
6 this Exhibit L, that's that most recent, you know, one of
7 the things I went through with him is the fact that -- I
8 mean first of all, it's American Family's position that
9 this is a forgery. This was created by Mr. Niell; this
10 Exhibit L. That he took other fax sheets and other pieces
11 of paper and just, you know, wrote out the note and -- and
12 tried -- is trying to make it look like he faxed this back
13 in 2002.

14 THE COURT: Well, it is true that there's
15 nothing to connect the first page to the second page
16 except for Mr. Niell's testimony.

17 MR. MAY: Exactly. And so -- and that is
18 exactly the reason why him manipulating documents in
19 another context to win a court case is so important.

20 THE COURT: What do you think about that,
21 Mr. Riley?

22 MR. RILEY: Well again, I don't know which of
23 the employees would testify to this. There were -- in
24 their investigative reports which we were provided, there
25 was some references to some former employees referring to

1 assuming -- I don't concede that it's similar related, but
2 here's somebody that sits here before he goes into court
3 altering documents by the Xerox machine.

4 Keep in mind in the context of this coming in,
5 you know, we -- we responded to voluntarily a lot more
6 requests for admissions than we would be permitted by the
7 rule. We stipulated to a bunch of stuff to avoid
8 unnecessary proof and get we spent a better part of
9 yesterday going document by document so we could pound
10 Mr. Niell over the head with this document, this
11 document. There's no question and he's never denied what
12 he did with respect to it. He's given his rationale, so I
13 just don't think in the totality of the circumstances of
14 this case, that some claim that he altered other lease
15 documents in connection with small claims litigation with
16 tenants meets the standard of 404(b) and, in any event, it
17 would be unduly prejudicial.

18 THE COURT: Well, I do appreciate the
19 cooperation of counsel with respect to request for
20 admissions and otherwise getting this case in a position
21 where perhaps it could be submitted a little quicker. I
22 also understand counsel's argument that in some ways,
23 maybe the Plaintiffs don't need this. That they've
24 already got essentially admissions that he submitted
25 145 phony claims and maybe this is overkill, but neither

1 hearing from other employees about whiteout Tuesday or
2 something like that. So first of all, I think that the
3 the direct evidence of that based at least on what we've
4 been provided is going to be very, very slim.

5 Secondly, the evidence concerning this letter --
6 you have a letter which he says he sent. He either sent
7 it or he didn't. There is a fax transmission thing which
8 would have been generated by a machine, so there's really
9 no question as to the fact that something was faxed on
10 that date at that time.

11 THE COURT: We know that something got faxed,
12 but there's no way of knowing whether it was this sheet
13 or, theoretically, he could have taken that second page
14 and years later wrote out the first page using the same
15 date and just put them together.

16 MR. RILEY: But that's different from saying
17 that he makes it a habit before he goes into court of
18 altering lease documents, particularly where if he's
19 involved in a court dispute -- I mean the tenant has got a
20 copy of the document; the lease document as well. So the
21 whole thing sounds somewhat contrived to give it -- and if
22 you look at the probative value of that in those
23 circumstances and you're willing to recognize that after
24 you do the 404(b) analysis, you have to look at the 403
25 analysis, I just think it would be unduly prejudicial

1 of those concerns really address the issue of the 404(b)
2 issue.

3 In other words, you don't get points for being
4 cooperative and it's not for me to decide, you know, how
5 much evidence the Plaintiff thinks they need in order to
6 prove their case. Rather, it's simply an analysis as to
7 whether or not they're entitled to offer the evidence
8 under 404(b). Frankly, if I allow it and I'm wrong and
9 they get reversed because of that, then they've shot
10 themselves in the foot because they've maybe overreached
11 and maybe could have gotten there without having to
12 introduce evidence which the circuit court would later
13 find to be objectionable.

14 But nonetheless, I have to go through my
15 analysis and enter whatever kind of ruling I think is
16 appropriate. I think that this kind of testimony is
17 similar in kind. It involves the manipulation of
18 documents by Mr. Niell in order to -- which are then
19 submitted to a third-party -- in this case, I guess the
20 court -- for the purpose of obtaining financial gain. So
21 I think that they're similar in kind. I'm assuming that
22 the testimony will be they're close in time, and by close
23 in time, I'm essentially talking about the 2000 to 2004
24 time frame which these events were all coming to pass.

25 MR. MAY: Your Honor, Teri -- excuse me. Teri

1 Sparks, I believe, was only employed there from '81 to '82
2 and she is the author of the phrase whiteout Tuesday and
3 she's the one we would be offering.

4 THE COURT: And while it may be -- have some
5 prejudicial effect -- although frankly based on what the
6 jury has heard so far, I don't know how much more shocked
7 they might be by that kind of testimony -- I think it has
8 probative value and I think the probative value is higher
9 than the prejudicial effect. So the Court believes that
10 testimony is admissible, assuming, again, the Plaintiff
11 can prove it by a preponderance of the evidence.

12 Are there other items, Mr. May?

13 MR. MAY: Well, the only thing I'm thinking
14 about now, Your Honor, is that -- and this is just simply
15 to make sure that we're not inconveniencing the jury, and
16 that is that I have Lisa Waggoner scheduled to be here at
17 one. Teri Sparks is also scheduled to be here at about
18 one. I really -- based on what you just told me -- think
19 that probably Lisa Wag -- I have -- I know that there are
20 some other issues that people want to take up with Lisa
21 Waggoner, but it seems like to me that I'm probably going
22 to have a little bit of time for an offer of proof and --
23 and I would like to question her on the record about that
24 and we'll also want to question Teri Sparks about other
25 things other than what you're going to let us do in front

1 of the jury. I'm just letting you know that those are
2 things that I'm wanting to do.

3 THE COURT: And we'll try to do that. Normally
4 -- I would normally try to do that during the noonhour,
5 but since we're quitting early today, we're not quitting
6 during the noonhour. What I would suggest is for the
7 offer of proof, maybe counsel can talk between now and
8 nine o'clock and see whether or not you can agree on what
9 a proffer by the Plaintiff as to what her testimony would
10 be. In other words, make a stipulation on the record, but
11 outside the presence of the jury, that if she were called,
12 she would testify to these facts and if the parties are
13 able to reach that agreement, then it, I think, preserves
14 the error without having to take additional time to
15 actually do the questions and answer. Now, if the parties
16 are unable to agree as to what her testimony would be,
17 then we'll have to have her testify on the record and
18 outside the presence of the jury.

19 So in summary, my ruling with respect to the
20 404(b) issues is that evidence regarding damage deposit
21 claims made by tenants in which the Defendant provided
22 phony documents or false documents in order to improperly
23 refuse to return damage deposits, I believe that that's
24 similar in kind and close in time to these events and,
25 therefore, admissible.

1 Similarly, the so-called whiteout Tuesday where
2 the testimony apparently will be that Mr. Niell would
3 alter documents which were then submitted to third persons
4 for the purpose of gaining a financial advantage; those
5 are similar in kind and assuming that they're close in
6 time and can be established by a preponderance of the
7 evidence, those would be admissible.

8 Also, J. J. McManus -- testimony regarding him
9 is admissible. I think we've already heard it, but that's
10 admissible.

11 And finally, testimony regarding Richard
12 Shanstrom and his 1899 and I guess whatever else there is
13 out there regarding Mr. Shanstrom would be admissible.
14 The other items I don't believe are similar in kind and
15 their probative value I think is outweighed by prejudicial
16 effect.

17 MR. MAY: Your Honor, I need to mention two
18 other things and I apologize. The first one I'm pretty
19 sure falls into the last part on your ruling. I just want
20 to mention it on the record. There's evidence that he
21 used a credit card for an imaginary brother named John
22 Niell and I think you would just say that's just like all
23 the other things you mentioned, Mr. May, as far as the --
24 like R. Gordon Sergeant, but I just wanted to mention that
25 that's another thing.

1 The last thing -- and I don't really consider it
2 a 404(b) issue per se, but I want to raise it just so that
3 -- because we would like to ask him about one of the
4 roofs that was not fixed that we paid -- that American
5 Family paid for and he sold it without disclosing the fact
6 that it had been fixed -- not fixed when it was not fixed
7 and he didn't disclose the damage. Peter, do you object
8 to that?

9 MR. RILEY: Well, first of all, there were two
10 properties that were sold and you can ask him about it.
11 You can ask him about it. You can ask him whether he
12 submitted disclosures to the buyers.

13 THE COURT: So apparently we don't have a
14 problem with that issue.

15 MR. MAY: Okay.

16 MR. PROCTOR: May I ask a clarifying question?

17 THE COURT: Sure.

18 MR. PROCTOR: I heard what you said on R. Gordon
19 Sergeant. Am I correct that I am not -- repeat not -- to
20 ask Mr. Niell if R. Gordon Sergeant is an officer in one
21 of his companies; right? Don't do that?

22 THE COURT: That's right.

23 MR. PROCTOR: Thank you.

24 THE COURT: Anything else, Mr. Riley?

25 MR. RILEY: Just from a procedural standpoint,

1 In terms of objecting to this evidence, do I need to
2 continue to object every time there's a question on, say,
3 the Home Doctor or can I merely object, you know -- you
4 know, I know that standing objections are always fraught
5 with peril in terms of did you adequately deal with the
6 scope and I don't want to have to make multiple objections
7 when these various things come up.

8 THE COURT: What I always tell lawyers is that I
9 can't give you any advice on the kind of record you need
10 to make. As far as I'm concerned, you can have, you know,
11 what's called a standing objection. Whether or not, you
12 know, the appellate court believes that was sufficient to
13 preserve error is between you and the appellate court.

14 MR. RILEY: I understand. But I believe that
15 the nature of these four items that come in are fairly
16 discreet. I'm willing to take that chance, but I thought
17 I would at least discuss with you before we go on the
18 record not in the presence of the jury how I intend to
19 handle it and so what I'll do is when anything is offered
20 on these, I'll make an objection and then -- then I'll ask
21 if I can have a standing objection to the testimony
22 concerning -- I will describe what it is and that's how I
23 intend to proceed.

24 THE COURT: That would be fine.

25 Mr. Woodward, you want any part of this?

1 made after May 10, 2001, anything paid under that, whether
2 it's to Mr. Niell on his behalf.

3 THE COURT: Does the contract provided for --
4 well, let me back up. I'm just trying to think out loud
5 here, but I understand under the fraudulent
6 misrepresentation claim, that essentially it's
7 consequential damages and the consequential damages would
8 be the amounts paid out to Mr. Niell and the -- also the
9 amounts you incurred in adjusting the losses and all the
10 rest of it. Count One though is a contract claim and the
11 damages presumably are established by the contract or --
12 well, maybe it's still what the consequential damages are
13 for the breach of the contract, but I guess maybe I'll
14 just ask Mr. Riley, do you concede that the -- that in
15 addition to the amounts that were paid to Mr. Niell, the
16 Plaintiffs are entitled to the adjusting losses or similar
17 kinds of claims?

18 MR. RILEY: No, Your Honor. I've never disputed
19 their numbers. I was never going to require them to prove
20 the numbers, but I don't agree that those automatically
21 are part of the breach of contract damages. No, I don't.

22 THE COURT: And how much are we talking about
23 here?

24 MR. MAY: Could I show you the exhibit?

25 MR. PROCTOR: Not much.

1 MR. WOODWARD: I think they're fighting pretty
2 good, Judge.

3 THE COURT: Is there anything else we need to
4 talk about before we get started this morning? I guess
5 there are -- I'm working on the instructions and I'm still
6 a little unclear as to what the parties believe the
7 measure of damages is. I looked at the instructions and
8 -- and my understanding is that at one point, the parties
9 more or less agreed on the measure of damages, but I think
10 the instruction says something like the amount paid out by
11 American Family under the policies reduced by any premiums
12 which Mr. Niell would have paid on those policies since
13 the loss and we haven't really gotten yet to -- well, I
14 think the spreadsheet exhibits that we looked at show the
15 amounts paid out, but is American Family also going to be
16 asking for adjusting expenses and other damages other than
17 simply the amounts paid to Mr. Niell?

18 MR. PROCTOR: Yes.

19 THE COURT: And is that included then in your
20 requested instruction about amounts paid out under the
21 policies?

22 MR. PROCTOR: I can't remember.

23 MR. MAY: Yes. Your Honor, the theory is
24 basically that in order to right this wrong, the policy
25 voids back to May 10, 2001, and all the payments that were

1 MR. MAY: No; we're not talking about a lot. I
2 could show the exhibit to the Court.

3 THE COURT: Have you got a ballpark? \$25,000?
4 More or less?

5 MR. PROCTOR: Take a quick peek at the exhibit.
6 We'll have that exhibit, Your Honor, in a minute and then
7 we won't have the potential of misrepresenting to you.

8 THE COURT: What's the number on it?

9 MR. PROCTOR: Exhibit number, Dave.

10 MR. MAY: 207.

11 THE COURT: I've got it in front of me.

12 MR. MAY: Okay. It looks like adjustment --
13 well, if you've got it, adjustment expenses paid to
14 PaceSetter, that would have been just the adjusting when
15 they went out and looked at the roofs early on. That's
16 \$5,000. The actual investigation expenses where in 2004
17 they go look at the roofs is about 22,000. That's that
18 third column down there.

19 THE COURT: And then also I assume the legal
20 defense expenses incurred on other claims that were made
21 of 11,784 and other adjustment expenses. So essentially
22 about \$100,000 worth of sort of amounts not paid to
23 Mr. Niell?

24 MR. MAY: I think that's pretty fair.

25 MR. PROCTOR: Correct.

1 THE COURT: And as I understand, Mr. Riley, you
2 don't dispute the accuracy of these numbers or that they
3 were fairly and reasonably incurred, but you don't think
4 that they are included in the measure of damages?

5 MR. RILEY: Yes.

6 THE COURT: And I don't recall; it's been a
7 while since I read the trial briefs, but I don't know that
8 the parties really address that issue, so sometime
9 tonight, tomorrow night, if you guys can take a look and
10 provide me with some cases as to whether or not these
11 adjustment losses are compensatory damages which the jury
12 would be entitled to make. My intention is to have the
13 jury instructions in a state that I can provide those to
14 you on Friday when we quit for the weekend and that way
15 you'll have the weekend to kind of look through them and
16 kind of know where I'm heading and so that we can kind of
17 shorten the amount of time we have to spend on that later
18 on.

19 Anything else we need to talk about?

20 MR. RILEY: Just scheduling. Where do you guys
21 think you are in terms of when do you think you'll be
22 done?

23 MR. MAY: I think -- well, today is definitely
24 shot. Tomorrow is going to be pretty full too. I don't
25 know how many hours we're going to get tomorrow.

1 week and then come back and submit it on Monday. In any
2 event, let's take our break. We'll start in with the jury
3 at nine o'clock.

4 MR. MAY: Your Honor, are we going to be
5 moving?

6 THE COURT: Oh, yeah. Thank you. We'll be here
7 today, but then actually the reason we're quitting early
8 at 2:30 is I have to pick a jury for Judge Reade at three
9 o'clock and then Judge Reade will reclaim the third floor
10 courtroom tomorrow to try her case. So after today, you
11 know, when we're done at 2:30, you guys will have to move
12 out. We'll be down in the second floor courtroom for the
13 balance of the case.

14 MR. PROCTOR: Judge, just on the logistical
15 side, we've got a lot of boxes to move and Your Honor is
16 starting up at 2:45. I'll do my best, but maybe
17 20 minutes instead of 15 might get this courtroom cleared
18 out.

19 THE COURT: Yeah. The other thing is if you
20 don't get everything out of here, that's probably okay.
21 But you would have to show up early tomorrow morning or
22 wait until we get done picking our jury and come and get
23 the rest of it. In order to pick the jury, we've got to
24 set up like 15 chairs or something in front here and so we
25 will need most of your stuff out of the way though.

1 THE COURT: Tomorrow is a full day. Nine to
2 4:30. So is Friday, nine to 4:30.

3 MR. MAY: I have a hard time thinking that we're
4 not going to go into Friday.

5 MR. PROCTOR: I believe we'll go into Friday
6 with a little bit of luck we will rest Friday. But I
7 can't guarantee to it, sir.

8 THE COURT: All right. Again, I'm hopeful that
9 we won't have any snags. I -- we need to finish this case
10 next week absolutely and obviously, if we can finish it
11 earlier in the week, that's probably beneficial to all of
12 us.

13 MR. PROCTOR: Judge, I don't think there's any
14 question we'll finish next week.

15 MR. RILEY: I mean you're going to call Bret?

16 MR. MAY: Yes, we're going to call Bret
17 Throlson.

18 MR. RILEY: Then it's likely we may not have
19 very much evidence because I mean the main components of
20 our case are Mr. Throlson -- are Mr. Niell and
21 Mr. Throlson and I believe we'll address both of those
22 things when he's on the stand as part of their case. We
23 may not have any evidence.

24 THE COURT: Counting today, we've got three
25 days. Maybe we'll be able to get the evidence in this

1 MR. PROCTOR: Yeah. I'm just saying if we could
2 have 20 minutes instead of 15, that might help it get done
3 for you so you can have a clean courtroom.

4 THE COURT: Dave's a young guy.

5 (Other proceedings were reported but not
6 transcribed.)

7 (In open court, outside the presence of the
8 jury.)

9 THE COURT: Let the record reflect that we're in
10 the courtroom and outside the presence of the jury. All
11 counsel are present.

12 Mr. May, I think you wanted to make an offer of
13 proof?

14 MR. MAY: Yes, Your Honor. I would like to call
15 Mr. Niell for an offer of proof.

16 THE COURT: Mr. Niell, if you'll resume your
17 place on the witness stand. You're still under oath.

18 DIRECT EXAMINATION

19 BY MR. MAY:

20 Q. Mr. Niell, you are currently under indictment; is
21 that correct?

22 A. Yes, I am.

23 Q. And I'm going to come up and show you my copy of the
24 indictment. And you'll see that I made a couple of marks
25 in it, but would you just look at it and make sure that it

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1 looks like the correct indictment.
 2 A. Yes, it is.
 3 Q. Okay. What's alleged against you in the indictment?
 4 A. There are two counts. One is to -- I believe is as
 5 far as mail fraud in regard to money received for hail
 6 claims, and the second count is 11 sections with regard to
 7 mail fraud with regard to tenant deposit claims.
 8 Q. Including the Home Doctor?
 9 A. Yes.
 10 Q. And actually, all told, there are 19 mail fraud
 11 counts; is that right?
 12 A. I believe so.
 13 Q. And what's your understanding as to the possible
 14 penalty for each of those?
 15 MR. RILEY: Your Honor, I need to voir dire the
 16 witness.
 17 THE COURT: You may.
 18 VOIR DIRE EXAMINATION
 19 BY MR. RILEY:
 20 Q. Can you answer that question without reference to
 21 discussions that you've had with Attorney Lane who is
 22 representing you in that matter?
 23 A. No, I cannot.
 24 MR. RILEY: Your Honor, my concern is they're
 25 asking him what his understanding is. He can't answer

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1 THE COURT: You can try.
 2 MR. MAY: Okay.
 3 DIRECT EXAMINATION (Continued)
 4 BY MR. MAY:
 5 Q. Has it been suggested to you that you may -- let me
 6 -- let me get this straight. Have you read The
 7 Cedar Rapids Gazette article about your indictment?
 8 A. No, I have not.
 9 Q. You haven't read any of The Cedar Rapids Gazette's
 10 articles about your indictment?
 11 A. I have not.
 12 Q. Have you read any of The Cedar Rapids Gazette's
 13 articles about this lawsuit?
 14 A. I have not.
 15 Q. You read The Cedar Rapids Gazette about the
 16 hailstorm, but not about your own indictment or about this
 17 lawsuit; correct?
 18 A. I had a little more time two years ago, sir.
 19 Q. Is it -- is it your understanding that you could go
 20 to prison for a long time if you were convicted?
 21 A. What is a long time?
 22 Q. Okay. What -- do you understand you could go to
 23 prison if you were -- if you were convicted?
 24 A. Yes, sir.
 25 Q. For a year?

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1 that without regard to disclosing what he has discussed
 2 with his counsel. It is no secret that law enforcement
 3 and U.S. Attorney personnel have been sitting there and
 4 monitoring this case. I think it's unfair --
 5 THE COURT: Well, as a practical matter, the
 6 purpose of the offer of proof is to provide the appellate
 7 court the record if I am in error on refusing to allow the
 8 testimony. I'm assuming the Eighth Circuit knows what the
 9 possible remedies are for mail fraud and, therefore, I
 10 don't think it really tells them anything they can't
 11 determine by looking at the United States Code.
 12 MR. MAY: And I'm not really trying to prove the
 13 legal point, Your Honor. What I'm trying to prove is
 14 whether Mr. Niell, like all the readers of The
 15 Cedar Rapids Gazette, have some understanding of the
 16 number of years that he would be facing.
 17 THE COURT: Well, that's true. The theory
 18 behind this offer, I guess, is that he's motivated in his
 19 testimony at this trial by his exposure in the criminal
 20 case and so his understanding as to what his exposure is,
 21 I guess, is theoretically associated with that offer. So
 22 I'll let him testify. Well, that still doesn't address
 23 the attorney/client privilege question.
 24 MR. MAY: Can I just try it a couple more
 25 questions and see if I can fix this at all?

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1 A. A little longer.
 2 Q. On each of those counts?
 3 A. No.
 4 Q. You couldn't have a year for each count?
 5 A. I was --
 6 MR. RILEY: Your Honor, I guess I would make the
 7 same objection. He's getting into something very specific
 8 that I think goes to what he talked to Mr. Lane about.
 9 MR. MAY: He started testifying about it.
 10 THE COURT: The maximum statutory penalties, of
 11 course, are contained in the United States Code. As
 12 counsel knows, there's a -- the United States Sentencing
 13 Commission has an elaborate process for determining a
 14 suggested sentencing guideline range. I'm assuming that
 15 Defendant's counsel has perhaps reviewed with him the --
 16 how those guidelines may apply in this case. It seems to
 17 me that it's sufficient and I think the appellate court
 18 can take judicial notice of the fact that the Defendant is
 19 facing federal prison time if he's convicted, and whether
 20 it's, you know, one year or ten years, the motivation is
 21 more or less the same, if there is one.
 22 MR. MAY: I'll move on, Your Honor.
 23 Q. And with regard to several of the counts in the
 24 indictment, those arise from the very same facts that are
 25 at issue in this lawsuit; correct?

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1 A. Yes.

2 Q. In regard to the -- and just to be clear, your claim
3 for replacement costs arising from the May 10, 2001,
4 hailstorm; correct?

5 A. That is correct.

6 Q. And isn't it true that part of your strategy in the
7 criminal case was to try to win the civil case and then
8 use that victory to help leverage the criminal case?

9 MR. RILEY: Your Honor, that would involve not
10 just attorney/client communication, but also may go to
11 issues. And, by the way, Your Honor, just to speed things
12 up, obviously, I've had conversation with counsel during
13 the course of settlement about the fact that there may be
14 some benefit or preclusion, depending on the outcome of
15 this case, and if it makes it easier, I can indicate that
16 I've discussed that with Mr. Proctor, but I don't think
17 you can get -- you know, start asking this witness about
18 his litigation strategy.

19 THE COURT: Well, your objection is sustained.
20 And, frankly, it just sort of reinforces the reason why I
21 didn't allow counsel to go there. Even if I had allowed
22 testimony that he was under indictment and allowed the
23 jury to somehow infer that has -- that influenced his
24 testimony in this case, the things you're talking about
25 now open up all kinds of cans of worms that I just don't

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1 mailed to you?

2 A. No, it did not.

3 Q. Have you ever used a notary stamp for your own
4 signature where that stamp bore someone else's name?

5 A. Yes, I have.

6 Q. What was the name on the stamp?

7 A. Andrea Mercer.

8 Q. Can you spell that?

9 A. A-n-d-r-e-a, M-e-r-c-e-r.

10 Q. And can you explain the circumstances?

11 A. It was to record something where Mr. McManus or
12 Mr. Sergeant signed something and the -- there was not a
13 notary available at that point.

14 Q. And who was Ms. Mercer?

15 A. She was a -- a former employee.

16 Q. Okay. Can you tell me the time frame in which this
17 occurred?

18 A. I don't know.

19 Q. Okay. But it would have been either Mr. McManus or
20 Mr. R. Gordon Sergeant who was signing the paper and then
21 you used the Mercer stamp; correct?

22 A. Yes.

23 Q. And then -- and you would have had to sign

24 Ms. Mercer's name; correct?

25 A. That's correct.

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1 think are probative, or at least the prejudicial effect
2 far outweighs the probative value. So I'm not going to
3 allow the question -- I'm not going to allow questions
4 that will impede or interfere or otherwise go into an
5 attorney/client privilege. Things that his attorney has
6 talked to him about. Trial strategies, benefits of doing
7 this or that.

8 MR. MAY: Well, Your Honor, since I'm making my
9 record, I just want to say that it's our position that I
10 didn't know that until it was disclosed to me, which in my
11 mind is a waiver of any privilege, but I'm happy to move
12 on because I know what your ruling is.

13 THE COURT: Well, I guess if you really want to
14 make your offer of proof, you can testify as to what you
15 were told and then it makes the -- it makes the record,
16 and to the extent I'm erred in refusing to allow that,
17 then I guess the appellate court would know what the
18 testimony would have been if I would have allowed it.

19 MR. MAY: I'm happy to go with Mr. Riley's
20 representation.

21 Q. Mr. Miell, has the pendency of that indictment
22 influenced your testimony this last week?

23 A. No, sir, it has not.

24 Q. Did it influence your testimony in particular with
25 regard to whether or not the mail -- the checks were

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1 Q. And do you recall was that with regard to a
2 particular property?

3 A. I don't know.

4 Q. Who's Cindi Peacock? Let me go back before I get to
5 that. Have you ever used any other notary stamp with
6 anyone else's name besides Ms. Mercer other than your own?

7 A. Yes.

8 Q. Whose was that?

9 A. Cindi Peacock.

10 Q. You used Cindi Peacock's name?

11 A. Yes.

12 Q. Her notary stamp?

13 A. Yes.

14 Q. Was that to notarize your own signature?

15 A. I believe it was Mr. McManus'.

16 Q. And when did that occur?

17 A. I'm not sure.

18 Q. How many times did that occur?

19 A. I'm not sure.

20 Q. How do you -- what facts at all do you have about
21 that incident?

22 A. I don't have any.

23 Q. Okay. Have you used anyone else's stamps to
24 notarize?

25 A. I don't recall.

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- 1 Q. Carla Wilson?
- 2 A. I don't think she had a stamp. I don't recall.
- 3 Q. Who is Carla Wilson?
- 4 A. She was an acquaintance.
- 5 Q. Did she notarize for you or did you use her stamp?
- 6 A. Both.
- 7 Q. You used Carla Wilson's stamp to notarize your own signature?
- 8 A. Yes.
- 9 Q. And then you would have to write Carla Wilson's signature; correct?
- 10 A. That's correct.
- 11 Q. And you understood when you were doing this that you're not supposed to use other people's notary stamps to notarize; correct?
- 12 A. That's correct.
- 13 Q. How long have you known Ms. Peacock?
- 14 A. Six years, seven years.
- 15 Q. Okay. So with regard to her, the notarizing that you just described using her stamp would have had to have occurred in the last seven years?
- 16 A. That's correct.
- 17 Q. And with regard to Carla Wilson, when did that occur?
- 18 A. I'm not sure.
- 19 Q. In the last seven years?

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- 1 well; correct?
- 2 A. Yes.
- 3 MR. MAY: We don't have copies? May I approach?
- 4 THE COURT: You may.
- 5 Q. I'll show you what I have marked as Exhibit 246, and can you first tell me what this is.
- 6 A. This is an affidavit in support of a forfeiture of real estate contract.
- 7 Q. Can you just explain to me, because I'm not a real estate guy, how that works.
- 8 A. That basically once someone is in default of a contract, there's 30 days to cure that contract and the real estate is forfeited if the contract is not cured at that point.
- 9 Q. So is that your signature?
- 10 A. Yes, it is.
- 11 Q. And your purpose in preparing this document was basically to take a piece of real estate back?
- 12 A. Yes, it was.
- 13 Q. Okay. And why? Because somebody had breached a contract or they weren't paying or what would it have been?
- 14 A. I don't know the circumstances.
- 15 Q. Okay. And do you see the notarization there where it

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- 1 A. I'm not sure.
- 2 Q. And with regard to Ms. Mercer?
- 3 A. I'm not sure on that -- that either.
- 4 Q. More than ten years?
- 5 A. Yes, it could be.
- 6 Q. Does R. Gordon Sergeant exist?
- 7 A. Yes.
- 8 Q. Can you describe him?
- 9 A. Approximately five six, maybe at this point mid-sixties.
- 10 Q. Where does he live?
- 11 A. I don't know.
- 12 Q. He was an officer on one or more of your companies; correct?
- 13 A. Yes.
- 14 Q. Which companies?
- 15 A. Advanced Equities.
- 16 Q. What else?
- 17 A. Equity Realtors.
- 18 Q. Go ahead.
- 19 A. And Mayfair -- M-a-y-f-a-i-r -- Builders.
- 20 Q. And are you able to produce any person that can verify his existence?
- 21 A. Not at this point.
- 22 Q. You were asked about that back in your deposition as

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- 1 says Carla Wilson?
- 2 A. Yes.
- 3 Q. That's your signature, isn't it?
- 4 A. I'm not sure.
- 5 Q. Does it look like it?
- 6 A. I don't know.
- 7 Q. Look at the angle.
- 8 A. It could be. I'm not sure.
- 9 Q. Showing you what has been marked as 247. You see where it's -- and first tell me what this is.
- 10 A. It's a release for mortgage.
- 11 Q. For what? One of your properties?
- 12 A. I believe it is.
- 13 Q. And is that -- you see where it says J. -- John J. McManus?
- 14 A. Yes.
- 15 Q. That's your signature; your writing?
- 16 A. I believe it is, yes.
- 17 Q. Okay. And Andrea Mercer is written down here on the notary?
- 18 A. Yes.
- 19 Q. Is that your writing?
- 20 A. I'm not sure.
- 21 Q. It could be?
- 22 A. I'm not sure.

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1 Q. It could be?

2 A. I don't know.

3 Q. You don't know whether it could be?

4 A. I don't know if it's mine or if it's hers. I don't

5 know.

6 Q. But it could be yours?

7 A. It could be.

8 Q. Showing you what has been marked as 249. Can you

9 identify that document?

10 A. It is a quitclaim deed.

11 Q. And this was for one of your properties; correct?

12 A. Again, I'm not sure.

13 Q. "For consideration of \$10 and other valuable

14 consideration, John J. McManus, a/k/a John J. McManas, a

15 single person, do hereby Quit Claim to Robert K. Niell all

16 our right, title, interest, estate, claim, and demand in

17 the following described real estate in Linn County,

18 Iowa." Is that a quitclaim of a piece of property to you?

19 A. Again, there's not a legal -- I'm not sure what the

20 address is, sir.

21 Q. Okay. Is this your signature, your writing down here

22 where it says John J. McManus?

23 A. I'm -- I believe it is, yes.

24 Q. Okay. And your writing down here where it says

25 Carla A. Wilson?

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1 Q. And 2000. Was that in 2000?

2 A. Yes, it is.

3 Q. And that's your writing, Carla Wilson notarizing it;

4 right?

5 A. Yes, it is.

6 Q. Okay. So you're not sure whether the John M. McManus

7 is yours or perhaps another of your employees you had sign

8 it?

9 A. I'm not sure.

10 Q. Do you have a notary stamp of your own?

11 A. Yes, I do.

12 Q. How long have you had one?

13 A. Fifteen years.

14 Q. So it was in force during the entire time that you

15 were notarizing using Carla Wilson's stamp, Cindi

16 Peacock's stamp, and Ms. Mercer's stamp?

17 A. Yes, it was.

18 Q. Have you ever signed R. Gordan Sergeant's name?

19 A. Yes, I have.

20 Q. Did you have a stamp made to use with R. Gordan

21 Sergeant written on it?

22 A. Yes, I did.

23 Q. Did you ever tell anyone who worked for you that

24 R. Gordan Sergeant was not a real person, but just sort of

25 a trade name?

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1 A. Yes, it is.

2 Q. And the -- and notarizing this; correct?

3 A. Yes, it is.

4 Q. Do you know of any other Robert K. Niells in the Linn

5 County area?

6 A. I'm not sure.

7 Q. Okay. You were talking about real estate -- Wait a

8 minute. You don't know whether you know any Robert K.

9 Niells?

10 A. I don't know of any.

11 Q. Okay. Look at that description of that property and

12 you were talking earlier about public records. I would

13 like you to tell me whether or not that's a property that

14 was quitclaimed to you.

15 A. It could be. I don't know what the address is off

16 the legal description. I'm sorry.

17 Q. Okay. This 249, that was in 1999; correct? Is that

18 what that says or six?

19 A. That appears -- I'm not sure.

20 Q. Okay. I think I skipped one. Now, I'm going to show

21 you 248. Do you see that signature right there? John M.

22 McManus. Do you see it?

23 A. Yes.

24 Q. Is that your writing?

25 A. I'm not sure.

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1 A. No, I never did.

2 Q. Did you ever suggest to them that your reason for

3 putting R. Gordan Sergeant on leases and other documents

4 was to avoid having tenants sue you?

5 A. No, I did not.

6 Q. Did you ever talk to -- did you ever say that to Lisa

7 Waggoner?

8 A. No, I did not.

9 Q. Did you ever tell Teri Sparks that -- in a sort of

10 winking way, if you will, that he's in Florida as if to

11 imply that he really didn't exist?

12 A. I never did that.

13 Q. Did you -- have you ever represented that the Home

14 Doctor is a third party, which is to say it's not you?

15 A. I'm not sure what a third party is.

16 Q. Okay. Did you ever represent that the Home Doctor

17 was not you?

18 A. No, I did not that I remember that, no.

19 Q. I was just talking to you about your deposition

20 testimony.

21 A. Yes, I did then.

22 Q. You remember that now?

23 A. Yes.

24 Q. Have there been any other instances in which you've

25 represented that the Home Doctor was not you?

1 A. I don't recall.
 2 Q. You agree with me in your deposition you were trying
 3 to tell us that the Home Doctor was not you; right?
 4 A. No, I wasn't.
 5 Q. Are you sure about that?
 6 THE COURT: Mr. May, this is not an offer of
 7 proof. This is just your cross-examination.
 8 MR. RILEY: That is in the record already.
 9 THE COURT: All right.
 10 Q. The bat cave. Have you ever denied knowing what the
 11 bat cave is?
 12 A. I'm not really sure I know what the bat cave is.
 13 Q. You don't know what the bat cave is?
 14 A. I heard it yesterday.
 15 Q. You offered an exhibit with the bat cave on it,
 16 didn't you?
 17 A. Yes.
 18 MR. MAY: May I approach, Your Honor?
 19 THE COURT: You may.
 20 Q. This is your Exhibit D; correct?
 21 A. Yes.
 22 Q. This is your handwriting; correct?
 23 A. Yes, it is.
 24 Q. You wrote the words bat cave on it, didn't you?
 25 A. Yes, I did.

1 correspondence setting forth proposed language from that
 2 ruling which could have been given to the jury. This is
 3 the statement from the summary judgment brief, so I think
 4 that for purposes of the Defendant's offer of proof, it
 5 would be sufficient to incorporate the exhibit itself. I
 6 can provide the Court with a copy, although I believe we
 7 delivered all of our exhibits, but if you want, I can
 8 provide a marked copy and then we would also incorporate
 9 the correspondence that was provided by our office to the
 10 Court and the response by Plaintiff's counsel in terms of
 11 if some language from that were to be given, what would be
 12 the appropriate language to give.
 13 THE COURT: Well, the brief itself is part of
 14 the docket file; however, I think in order to preserve the
 15 record on -- record on appeal, it would need to be offered
 16 as a separate exhibit as if you were offering it in front
 17 of a jury. Obviously, my ruling is that it's not
 18 admissible, but it would be placed then in the file and
 19 sent up with any appeal.
 20 MR. RILEY: Very well. For purposes of our
 21 offer of proof, we would offer Defendant's Exhibit D and
 22 further state what is probably clear in the record, but if
 23 not certainly our intent, which is that a portion of
 24 paragraph 12 that -- relating to the position of American
 25 Family that it had produced documents which did not

1 THE COURT: Mr. May, it's about four minutes to
 2 12. I have a 12 o'clock hearing, so I'm going to have to
 3 take a break so I can do that. I'm guessing it's going to
 4 take maybe 20 minutes or so. We'll reconvene up here at
 5 12:30.
 6 (Recess at 11:57 a.m., until 12:29 p.m.)
 7 THE COURT: Mr. Niell, if you'll resume your
 8 place on the witness stand.
 9 MR. MAY: Your Honor, I think we're done with
 10 his testimony at this point. We're going to offer 246,
 11 247, 248, and 249 into evidence.
 12 THE COURT: The Court will allow them. The
 13 Court's ruling remains the same; however, the exhibits
 14 will be placed in the file for preserving any error on
 15 appeal.
 16 (Plaintiff's Exhibits 246, 247, 248, and
 17 249 were offered and received in evidence
 18 during the offer of proof.)
 19 THE COURT: Is there any other offers of proof
 20 or similar items before we take up motions?
 21 MR. RILEY: Your Honor, just so it's clear, we
 22 had marked Exhibit D, which was subject to the Motion in
 23 Limine and I believe an offer of proof. With respect to
 24 the matters raised by that that would be encompassed by
 25 the exhibit itself which the Court has, as well as the

1 include the letters, which is the relevant portion of the
 2 brief. In other words, it was not our intent that the
 3 entire brief be necessarily accepted or probative, but we
 4 would offer as part of our offer of proof Exhibit D and we
 5 would like to have it included with that. And if it's
 6 necessary to put in the written form, I'll have to get a
 7 copy of it, but the correspondence that was provided by
 8 both Plaintiff, Defendant, and then Plaintiff through
 9 their counsel concerning what would be the appropriate
 10 language from Exhibit D to be provided to the jury.
 11 THE COURT: Well, Exhibit D, which you've
 12 provided the Court, will be kept by the Clerk of Court for
 13 any possible appeal. Will not be submitted to the jury.
 14 To the extent you want to make any additional record as to
 15 those portions of Exhibit D which you would have offered
 16 if permitted, now is kind of the time to do that.
 17 MR. RILEY: And I apologize. I'm not sure I
 18 have my -- you know, I don't have my entire file on this,
 19 Your Honor, because of the fact that -- I mean there's a
 20 limit to what I wanted to haul down here, and so I don't
 21 believe I included the correspondence and all the
 22 pleadings. I could probably get copies of that, because
 23 for one thing, I have sort of my computer back in the
 24 office in electronic form and get those generated, printed
 25 off.

1 THE COURT: Let's take a 30 second break. I
2 think I may be able to help you out.

3 MR. RILEY: I'm going to mark as Exhibit D-1 my
4 correspondence to the Court of December 27, 2007, which
5 was our suggestion of the particular language from the
6 order that we felt should be included or provided to the
7 jury.

8 THE COURT: Exhibit D-1 will be docketed by the
9 clerk and reserved for any possible appeal.

10 (Defendant's Exhibit D-1 was offered and
11 received in evidence during the offer of
12 proof.)

13 THE COURT: Any additional offers of proof?

14 MR. RILEY: Not from the Defendant.

15 MR. WOODWARD: None from Throlson.

16 THE COURT: Mr. Riley, did you have any motions
17 that you wanted to make?

18 MR. RILEY: Yes, Your Honor. At this time, the
19 evidence having closed but pursuant to the agreement that
20 was made at the close of the Plaintiff's evidence, we
21 would move for a directed verdict on the claims asserted
22 by the Plaintiff in this litigation. There are four
23 claims that have been asserted. A breach of contract
24 claim, a fraudulent misrepresentation claim, a RICO claim,
25 and a claim of continuing conduct under Iowa Code

1 Chapter 706A. And I would like to address them first with
2 respect to the RICO claim; then with respect to the
3 Chapter 706A claim, and then the fraud and breach of
4 contract claims.

5 First of all, with respect to the RICO claim, we
6 believe that taking all of the evidence at the close of
7 Plaintiff's evidence -- or at the close of all evidence in
8 the light most favorable to the Plaintiff, the Plaintiff
9 has failed to generate a jury question on all of the -- on
10 all of the elements that it needs to prove in connection
11 with a RICO claim, and including, but not limited to, the
12 failure to adequately prove the existence of an
13 enterprise; the failure to prove participation in the
14 enterprise by Niell; the failure to prove continuity, and
15 the failure to prove appropriate predicate acts. We would
16 also state there is no evidence of damage, in as much as
17 the undisputed evidence shows that ultimately Mr. Niell
18 paid more in connection with the claims -- or in
19 connection with fixing roofs than he was paid by American
20 Family.

21 With respect to the Chapter 706A claim, we would
22 incorporate the argument we made with respect to the RICO
23 claims. State that it is our belief and position that
24 Chapter 706A is based upon and derived from the federal
25 RICO statute and so all of the elements that would be

1 required for RICO are not missing and, in particular,
2 again, you know, continuity and I just want to make a
3 general observation. This was a situation where we have a
4 discreet specific thing that was done here; submission of
5 claims over a period of just under a year. I don't see
6 where there is -- since they all grew out of one loss
7 event, there is any basis to submit that there would be
8 the potential for any continuing similar conduct in the
9 future.

10 With respect to the fraudulent misrepresentation
11 claim, we move for directed verdict on the basis that the
12 Defendant has failed -- or the Plaintiff has failed to
13 prove evidence of all the elements required to prove, but
14 in particular we would say that there is insufficient
15 evidence of reasonable reliance in fact. I think it is
16 clear from the testimony of Mr. Nau that he really did not
17 look at, nor particularly care what type of documentation
18 was submitted. Further, we believe there is no evidence
19 of damages with respect to the matter of fraudulent
20 misrepresentation for the same grounds we noted earlier.
21 That is, that Mr. Niell ultimately spent more fixing the
22 roofs.

23 With respect to the contract claim, we believe
24 that the Plaintiff has failed to establish an evidentiary
25 basis to void the policies. Further, in the event that

1 they have provided evidence to provide a basis for voiding
2 the policies, that there's insufficient evidence under the
3 policies as to the effect of the voiding or the time in
4 which the voiding would be effective. Furthermore, we
5 believe that there is no basis to void the contract with
6 respect to the separate and discreet claim for actual cash
7 value which was -- or with respect to the costs associated
8 with adjusting that claim because those payments and those
9 costs would have been paid regardless of anything alleged
10 to have been done by the Defendant.

11 Finally, we believe that there is insufficient
12 evidence to submit the issue of punitive damages to the
13 jury. But in any event, not in connection with any RICO
14 claim as it's our position that punitive damages are not
15 allowed under the RICO statute.

16 So for all of those reasons, we would move the
17 Court to direct a verdict on the claims of the Plaintiff.

18 THE COURT: Mr. May, do you wish to respond?

19 MR. MAY: Yes, Your Honor. And I'm going to try
20 to be brief. With regard to the RICO claim, we have
21 briefed that issue and made previous record on that issue
22 throughout this trial as to why we think all of those
23 elements -- the required elements are fulfilled. And I'm
24 not sure what else to add to that, frankly. We have a --
25 you know, at a minimum, a closed period of continuity of

1 at least a year and possibly going back several more
2 months than a year. Also, there -- as I mentioned before,
3 we assert the possibility of a more open-ended continuity
4 in light of the ongoing insurance fraud perpetrated by
5 Mr. Niell in this litigation.

6 With regard to the Iowa Continuing Criminal Act,
7 we've already briefed it. I don't want to bother you.
8 I'll just say I think you've agreed with me before that
9 the participation element is not an impediment or not a
10 required element.

11 With regard to the fraud, I mean we've -- if you
12 just read the stipulation, there's more than enough for
13 the Judge to -- or for the jury to infer fraud, plus all
14 the other misrepresentations that we've gone over and
15 over, and with regard to justified reliance, whether Niell
16 was critical of John Kau of paying him and he said he
17 wasn't. That's really grounds for -- to eliminate that
18 issue in our favor.

19 With regard to the contracts, you know, Iowa law
20 is clear Mr. Niell -- that an insurance company can void
21 the policy when there's fraud by an insured and Mr. Niell
22 has admitted to violating that -- that -- the fraud
23 clause, if you will, and also the evidence of damages has
24 been presented that we've had lots of money flowing from
25 American Family to Mr. Niell that would not otherwise have

1 Count Three is the RICO claim and Count Four is
2 the ongoing criminal conduct state claim based on
3 Chapter 706A of the Iowa Code. We've had several
4 discussions about these and, frankly, I've spent a fair
5 amount of time reading lots of cases on the subject. Also
6 some treatises on RICO. I won't prolong the record here
7 either. Frankly, if I'm wrong, the parties can, you know,
8 make their arguments in -- in St. Louis and what I have to
9 say here today isn't going to make much difference one way
10 or the other. You're probably more interested in the
11 bottom line.

12 I've concluded that neither the RICO claim nor
13 the ongoing criminal conduct claim should be submitted to
14 the jury. With respect to the RICO claim, there are
15 essentially four elements. The existence of an
16 enterprise, and in this case, Plaintiff claims that it is
17 the enterprise and I believe that -- that the Plaintiff
18 can be the enterprise. The Plaintiffs have cited a case
19 Aetna Casualty Surety Company v. B & P Autobody, 43 F.3d
20 1546 where the Defendants were essentially submitting
21 fraudulent claims regarding vehicle damage and being paid
22 by Aetna. In that case, the First Circuit said that the
23 insurance company plaintiff can be the enterprise.

24 The second element is that there has to be
25 conduct by the Defendant in association with the

1 been paid; money to which he was not entitled to in 2001,
2 2002. So that more than covers the damages.

3 On the punitive damages, I'm just going to
4 withdraw the punitive damage question with regard to the
5 RICO because I found five district court cases and four of
6 them suggested they didn't want to go that way, so there's
7 no use to create that issue.

8 But with regard to all the other claims, I see
9 no impediment to punitive damages. This has been a scheme
10 to defraud that has been admitted and that creates a prima
11 facie case for punitive damages.

12 THE COURT: I need to grab my notes off of my
13 desk. It will take me 30 seconds.

14 First of all, the record should reflect that we
15 have had this discussion, I think, a couple of different
16 times and we've discussed the various elements. Well, let
17 me back up. Let me take the counts in order.

18 The contract case in -- viewing the evidence in
19 the light most favorable to the Plaintiff, the Court
20 believes there is sufficient evidence to submit the claim
21 to the jury.

22 Similarly, with respect to Count Two, fraudulent
23 misrepresentation, when viewing the evidence in the light
24 most favorable to the Plaintiff, the Court concludes that
25 that claim should be submitted to the jury.

1 enterprise, and the -- sort of the principal case in this
2 area is the United States Supreme Court case of Reves v.
3 Ernst & Young, 507 U.S. 170. And it indicated that there
4 has to be participation, which includes operation or
5 management of the enterprise. Obviously, Mr. Niell is not
6 an employee of this enterprise and, therefore, he would
7 have to be participating -- Well, strike that. The
8 statute says he must participate directly or indirectly in
9 the conduct of such enterprise's affairs, and in Reves v.
10 Ernst & Young, the Court interpreted the word conduct and
11 concluded that it must involve some sort of operation or
12 management.

13 In this case, the Court does not find that
14 Defendant engaged in the operation or management of
15 American Family. I know that the theory is that if he had
16 not made fraudulent claims, then American Family would not
17 have paid him, and in that way, he participated in the
18 operation of American Family. And Plaintiff cites the
19 Aetna Casualty case, which suggests that might not be a
20 bad argument. There is a distinction, however, with
21 respect to the facts in Aetna. In that case, there were
22 two adjusters of Aetna who were in on it that were
23 associated with the enterprise and were part of the
24 scheme. In this case, there's no indication that anyone
25 associated with the enterprise -- American Family -- was

1 In on the scheme, and I think that's an important factual
2 distinction.

3 In addition, there are cases that have followed
4 Aetna which are critical of the First Circuit's view and I
5 would cite AllState Insurance Company v. Seigel, which is
6 312 F.Supp.2d 260. It's a district court case out of the
7 District of Connecticut. And there's a long analysis of
8 Aetna in there and in Reves and I won't go through it in
9 detail, but I will just sort of read one small section.
10 It says this. "Moreover, the Court is concerned that the
11 First Circuit's construction of the operation and
12 management test might well read that test out of the act.
13 For under AllState's reading of P & B Autobody -- which
14 is the Aetna case -- any time the company is defrauded by
15 the conduct of a defendant, one could say that the
16 defendant "controlled" the company's operations, since
17 absent the fraud, the company would not have done what it
18 did or acted in the manner in which it did. Such a
19 free-wheeling interpretation of the operation and
20 management test would appear to be inconsistent with
21 Reves, and as AllState's counsel essentially conceded at
22 oral argument, with the more rigorous approach to the
23 operation and management requirement that district courts
24 in the Second Circuit have adopted."

25 Well, similarly the Eighth Circuit has adopted a

1 business-the appraising, investigating, process and paying
2 of insurance claims. Indeed, the Aetna appraisers
3 "helped" the other defendants defraud Aetna and were also
4 defendants in the RICO action. Thus, absent some
5 indication that Steiner had involvement in the direction
6 or control of Arrandt's business in a more material way
7 than just demanding payment by sending an invoice,
8 Arrandt's claim fails."

9 And then later in the decision, "To accept
10 Arrandt's reading would be to nullify the Reves test,
11 which specifically rejected the interpretation that
12 "almost any involvement in the affairs of an enterprise
13 would satisfy the conduct or participate requirement."

14 So again, I am distinguishing Aetna on its
15 facts. I also frankly am more sympathetic to those that
16 are more critical of Aetna and I believe under Bennett v.
17 Berg, which is a controlling Eighth Circuit precedent,
18 that the participation requirement has not been met here.

19 Just by way of parenthetical, I do think that
20 there's evidence which would support the finding of two or
21 more predicate acts, which is the third requirement.

22 The fourth requirement under the code is that
23 there has to be a pattern of racketeering and the cases
24 which interpret pattern require a continuity. This is a
25 close ended period of time of approximately one year, as

1 more rigorous view than what the First Circuit described
2 in Aetna, and specifically the Eighth Circuit precedent
3 that I'm bound by is Bennett v. Berg, 710 F.2d 1361, which
4 the Supreme Court relied on or cited in the Reves case.
5 Another case that's critical of the Aetna case is
6 Arrandt -- A-r-r-a-n-d-t -- v. Steiner Corporation,
7 which is a Northern District of Illinois case. It's not
8 reported, but it's found at 2001 WL 893807. And again,
9 I'll read just a little bit of it. It talks about the
10 Plaintiff relying on Aetna Casualty v. P & B Autobody and
11 it says, "Plaintiff relies on Aetna Casualty v. P & B
12 Autobody to argue that merely causing the enterprise to
13 pay fraudulent claims is sufficient to meet the Reves
14 "operation or management" test. However, in Aetna, the
15 Reves test was not met merely because defendants (body
16 shop owners who intentionally inflicted damage to cars and
17 placed defective parts on them for appraisal) submitted
18 fraudulent claims to the plaintiff enterprise, Aetna
19 Casualty Surety Company, which Aetna paid. Rather, in
20 order for Aetna to pay the false claims, there had to
21 first be an appraisal by Aetna appraisers, and, it was
22 defendants' actions in causing Aetna's appraisers to
23 approve false claims and conduct their appraisals in a
24 manner contrary to Aetna's business practices that enabled
25 defendants to exert control over a vital aspect of Aetna's

1 Mr. Riley points out. It all arises out of a single
2 event; the hailstorm event. There is a single victim in
3 this case. The Court believes that the continuity or
4 pattern of racketeering requirement has not been met. And
5 I'm relying in part on a Northern District of Iowa case
6 when Judge Melloy was a district court judge. It's Walker
7 Manufacturing v. Hoffmann, 157 F.Supp.2d 1012, a 2001
8 case. And in that case, he selects some of the cases that
9 talk about the continuity requirement.

10 With respect to the ongoing criminal conduct
11 claim, the Court isn't aided by any state appellate
12 decisions regarding that statute because they're only
13 relatively recently adopted in 1996 and to my knowledge,
14 there have been no state appellate decisions which have
15 interpreted the civil claim aspects of Chapter 706A.
16 There are criminal cases, however, I think that talk about
17 the fact that it's patterned after the federal RICO
18 statute. 706A.2 sets forth the kind of violations that
19 can give rise to a claim under this chapter. Paragraph 1C
20 says that, "It is unlawful for any person to knowingly
21 conduct the affairs of any enterprise through specified
22 unlawful activity or to knowingly participate directly or
23 indirectly in any enterprise that the person knows is
24 being conducted through specified unlawful activity."
25 That's the participation provision, and as I've discussed,

1 I don't think that's been met.

2 However, there is another way -- In fact, there
3 are lots of different ways you can have a violation of
4 706. Paragraph 706A.2(4) talks about un -- acts of
5 specified unlawful activity and it says, "It is unlawful
6 for any person to commit specified unlawful activity as
7 defined in Section 706A.1," and 706A.1 is the definition
8 section and subparagraph 5 defines specified unlawful
9 activity and it says it means any act, including any
10 preparatory or completed offense committed for financial
11 gain or a continuing basis that is punishable as an
12 indictable offense in the lawsuit of the state in which it
13 occurred and under the laws of that state.

14 So there's a continuing basis requirement and
15 that's similar to the continuity requirement and,
16 therefore, because 706A is patterned after RICO, I'm
17 interpreting it the same way. So either under
18 706A.2(1)(c) or 706A.2(4), which in turn refers to -- to
19 706A.2(5), the Court believes that the participation
20 requirements and the continuing basis requirements
21 preclude Plaintiff's recovery under that chapter.

22 Therefore, Defendant's Motion for Directed
23 Verdict with respect to Counts Three and Four will be
24 sustained.

25 With respect to the punitive damages claim, the

1 either the -- for a privately owned motor vehicle under
2 the Businessowner's Package Policy or the commercial
3 blanket excess policy.

4 Second -- our second basis is that the evidence
5 in this case is that there has been no evidence that he
6 specifically asked Mr. Throlson to insure this vehicle
7 under either policy. Instead, the testimony that
8 Mr. Niell gave is that he asked to be fully insured, or
9 words to that effect. That type of claim falls under Iowa
10 state law under the Sandbulte v. Farm Bureau Mutual
11 Insurance Company, 343 N.W.2d 457 (1984).

12 And in that case, and the law in Iowa has long
13 held that that is more of a request for full coverage.
14 Gets into whether there's a different relationship with an
15 agent than the strict agent client. In fact, the
16 undisputed evidence in this case is that Mr. Throlson was
17 a captive agent with American Family. He was not an
18 independent insurance broker or the like who was required
19 to provide a different level of care.

20 Further, there's been no testimony, expert or
21 otherwise, as to any requirements on the part of
22 Mr. Throlson to provide "full coverage". I think
23 further, Your Honor, there's been no evidence in the
24 record -- and this lies in with that same argument of a
25 duty owed by Mr. Throlson. Again, it's these fully

1 Court believes that there is sufficient evidence to
2 generate a jury question on that issue and, therefore, the
3 Motion for Directed Verdict in that regard will be
4 denied.

5 Mr. Woodward, did you have any motions you
6 wanted to make?

7 MR. WOODWARD: Yes, Your Honor. Thank you.
8 Comes now Third-Party Defendant Bret Throlson and for his
9 Motion for Directed Verdict or Judgment as a Matter of
10 Law, we would move as follows: The Court in this case had
11 previously defined the claim -- the only possible viable
12 claim based upon an affidavit submitted in support of
13 summary judgment or resistance to summary judgment as a
14 request for service to insure a 1997 GMC pickup truck
15 under a Businessowner's Package Policy. I think through
16 the course of discussions and the trial, that might have
17 been expanded to also include this commercial excess --
18 commercial blanket excess policy, so we're not dealing
19 with a case of advice, knowledge, or error on the basis of
20 Mr. Throlson.

21 First -- or our first basis for Motion for
22 Directed Verdict is that insuring a vehicle under a BOPP
23 or a commercial excess policy is impossible. The
24 undisputed evidence is that neither policy would afford
25 any type of coverage. You can't purchase coverage for

1 insured and if that's the case, there's no evidence as to
2 that necessary relationship under Sandbulte, and further,
3 I believe that would require expert testimony under
4 Kruckenberg v. Abransohn.

5 Finally, Your Honor, our last basis for our
6 directed verdict motion is that there's been no
7 substantial evidence regarding the reasonableness of the
8 damages which the Plaintiff claims. The Plaintiff's
9 testimony about medical expenses or the lack is not
10 sufficient to raise a jury issue as to his damages he
11 claims. The Plaintiff has the burden of proof, and as the
12 Court noted during one of our sidebars, essentially we
13 could be trying this whole case here to determine
14 reasonableness. There's no stipulation regarding that.
15 The Plaintiff has totally failed to introduce any evidence
16 as to the reasonableness of the settlement he undertook,
17 and for those reasons, we believe that Mr. Throlson is
18 entitled to Judgment as a Matter of Law as to the claim of
19 agent negligence.

20 THE COURT: Mr. Riley?

21 MR. RILEY: Thank you, Your Honor. The
22 Defendant, by way of resistance to the Third-Party
23 Defendant's Motion for Directed Verdict, would say, first
24 of all, that the evidence does establish that Mr. Niell
25 requested insurance. Secondly, I believe Mr. Throlson

1 acknowledged that Mr. Miell requested that he have all
2 potential risks, not just the building risks, covered.
3 And thirdly, it is clear that Mr. Throlson believed and
4 assumed until January of 2004 that there was coverage. So
5 in a broad view, that is really dispositive of the
6 sufficiency of the negligence claim. That is a request
7 for insurance, which is to some substantial degree
8 corroborated by admissions of the insurance agent. The
9 fact that the policy under its terms would not provide
10 coverage would not -- would not provide a defense to the
11 failure to provide the coverage that is there. The fact
12 that he is a captive agent does not seem to preclude his
13 ability to procure the necessary insurance and I believe
14 that this is not an area where the need for expert
15 testimony is present.

16 Finally, as to the reasonableness of the
17 settlement, the Court's comment that you could retry the
18 underlying case is true. Either side could have. The
19 question is, is there sufficient evidence for the trier of
20 fact to determine that the settlement was reasonable?
21 There's evidence -- Well, first of all, it was a case of
22 absolute liability. There was a case of substantial
23 medical expenses. There was an eminent trial date of
24 concern with the defense that was provided, and so for all
25 of these reasons, I think there's a substantial basis to

1 instructions that I have added language or included
2 language in my instructions that specifically indicates
3 that the issue here is not whether or not he --
4 Mr. Throlson -- gave appropriate advice, but rather
5 whether Mr. Miell instructed Mr. Throlson to do a
6 particular thing and Mr. Throlson negligently failed to do
7 that thing, which is the way I understand the issue.

8 With respect to the relative paucity of evidence
9 on the issue of damages, it's true that I was a little
10 surprised, frankly, by the fact that neither party really
11 offered much evidence on that subject. I mean
12 theoretically, either party could have offered evidence as
13 to the extent of Tendrick's injuries or the medical bills
14 or anything else. I think, in fact, either party could
15 have called expert testimony probably to testify as to the
16 recentness of a particular settlement based on additional
17 factors, but no one did that. I think, however, that just
18 goes to, you know, the weight of the evidence. The
19 parties can argue how good the evidence is and the jury
20 can weigh that in determining, if they get to the issue of
21 damages, how much they should award.

22 I would note that presumably Mr. Miell, when
23 he's paying for it out of his own pocket, doesn't have
24 incentive to pay more than he thought was reasonable, so
25 there's some evidence or some inference that he must have

1 -- or there's substantial evidence far more than mere
2 sufficiency to provide a basis for reasonableness in
3 Mr. Miell's actions in settling the claim.

4 THE COURT: The issue of whether or not an
5 expert witness is required was addressed by the Court in
6 the Motion for Summary Judgment. The Plaintiff's claim
7 alleged that Mr. Throlson was negligent in providing
8 appropriate services and advice. And as I indicated in my
9 ruling, in order to find an agent negligent for giving
10 appropriate advice, you would need an expert to testify as
11 to what kind of advice an agent is supposed to give.
12 However, I did indicate that with respect to services --
13 incidentally, that's essentially what the Kruckenberg case
14 says, but also it specifically says -- and I'm
15 quoting -- "This is not a case in which the agent failed
16 to procure coverage requested by the client."

17 That's the case we have here, at least if one
18 believes the Third-Party Plaintiff. Mr. Miell claims that
19 he essentially instructed Mr. Throlson to procure certain
20 insurance and that Mr. Throlson failed to do so. When
21 viewing the evidence in the light most favorable to the
22 Third-Party Plaintiff, the Court believes that the
23 evidence is sufficient to generate a jury question in that
24 regard.

25 I would indicate, however, you'll see in my

1 thought that was a reasonable settlement or otherwise he
2 wouldn't have paid it.

3 In any event, the motion to direct a verdict on
4 the third-party claim is denied.

5 Any record that the Plaintiffs want to make?

6 MR. MAY: Yes, Your Honor. The Plaintiff would
7 like to move for Judgment as a Matter of Law and I'll say
8 it like Mr. Woodward and/or directed verdict. We believe
9 we're entitled to judgment on Count One. Mr. Miell has
10 admitted violation of the fraud clause. That on top of
11 all the facts and the stipulations create more than a
12 prima facie case. It, in fact, forecloses him from
13 debating whether or not the entire policy is void because
14 of his willful concealment and misrepresentation. I do
15 understand that there is this claim of sort of an
16 anticipatory breach. It kind of reminds me, Judge, of the
17 farmers that I once represented back in state court who
18 tried to make a similar claim in -- I think it was the FS
19 case -- where summary judgment was granted in favor of
20 Fred Mansfield's client.

21 THE COURT: That was before me.

22 MR. MAY: Yeah. Back before you for Fred
23 Mansfield against my farmers and we had tried to -- to put
24 together a they breached first argument and the Court
25 didn't think there was evidence of it.

1 THE COURT: I think I got affirmed on appeal.
 2 MR. MAY: You got affirmed on appeal, Judge.
 3 MR. PROCTOR: You should be proud of that,
 4 Judge.

5 MR. MAY: You wonder why I remember it. And
 6 It's the same thing. What Mr. Niell is trying to say --
 7 No. 1, I don't think I've ever heard him specifically say
 8 that.

9 THE COURT: Let me see if I can short cut this a
 10 little bit. I -- I have considered what you refer to as
 11 the anticipatory breach claim and -- and I don't think it
 12 has merit either. I don't think it constitutes a defense
 13 to the breach of contract claim, Count One, for five
 14 reasons. One, is that I don't think it is a breach of
 15 contract. As I understand it, the theory -- and I guess,
 16 Mr. Riley, you can correct me here if I've got your theory
 17 wrong, but as I understand the theory, it's that the
 18 breach of contract by American Family is the providing of
 19 erroneous information. I don't believe -- even if that's
 20 true -- that that would be a breach of contract. A breach
 21 of contract is failure to perform some aspect of the
 22 agreement. And, therefore, if, for example, Mr. Niell had
 23 submitted a claim and American Family had said, "We're not
 24 paying it because there's a one year limitation," that
 25 would be a breach of contract. But merely giving

1 Information would somehow be a defense to the breach of
 2 contract claim. It is relevant to the fraudulent
 3 misrepresentation claim in my view because I think it goes
 4 to Defendant's intent. If he was told that he had one
 5 year or if he otherwise believed that for whatever
 6 reasons, then it goes to whether or not he had an intent
 7 to deceive, or at least that's what I've concluded in my
 8 pretrial rulings. So that won't be part of the breach of
 9 contract claim.

10 Having said that, however, and I guess I haven't
 11 really allowed you to finish your record with respect to
 12 the motion, but I don't think that automatically entitles
 13 you to directed verdict on the contract claim. Well, let
 14 me -- I guess I might as well tell you what my draft of
 15 the instructions says because you're going to see them in
 16 few minutes anyway.

17 There are four elements of the breach of
 18 contract. Existence of the contract, the terms, the
 19 breach, and the damages. You'll see that I've told the
 20 jury that the first and third elements have been
 21 established as a matter of law. That there's no question
 22 there were contracts in effect. The policies here are
 23 undisputed. The third element is the breach, and I've
 24 concluded that as a matter of law, there was a breach.
 25 It's undisputed that the Defendant submitted false

1 erroneous information -- assuming it was done -- I don't
 2 believe constitutes breach of contract.

3 No. 2, this -- the -- this so-called
 4 anticipatory breach or whatever you want to term it was
 5 not pled in this case.

6 No. 3, it was not identified in the final
 7 pretrial order as an issue to be presented by the
 8 parties.

9 No. 4, it was not included in the requested
 10 instructions as an issue which upon which the jury would
 11 be instructed.

12 And No. 5, even if you assume that it is a
 13 breach of contract to give erroneous information and that
 14 it had been properly pled and that it was identified as an
 15 issue and it was included in the requested instructions as
 16 a matter of law, the remedy is not to submit fraudulent
 17 claims. In other words, if American Family breached the
 18 contract by giving erroneous information, then the
 19 Defendant's remedy is to declare the contract void or to,
 20 you know, sue on the breach somehow or do something, but I
 21 conclude as a matter of law that when one side breaches
 22 the contract, your remedy is not to submit fraudulent
 23 claims.

24 So you'll see when you get my instructions that
 25 I have not instructed that the provision of erroneous

1 documents and that's a direct breach of paragraph ten.

2 I didn't tell the jury that the second element,
 3 the terms, are established or the damages because of the
 4 issue of what does it mean when the contract is void. The
 5 jury is going to have to decide what the effect of that
 6 language is, because it's not explicit in the contract as
 7 to whether that's void ab initio or at the time of the
 8 loss or at some other time and they can apply a -- based
 9 on the instructions, a reasonable interpretation. They
 10 can rely on testimony. I know Ms. DeLanoit said that
 11 that's the standard in the industry. They can apply their
 12 common sense. They can look at the rest of the policy.
 13 There's all those factors that are listed in the
 14 instructions and then essentially they'll decide whether
 15 or not, in fact, that means void at the time of the loss
 16 or something else. And the parties are free, I guess, to
 17 argue that issue.

18 Go ahead and finish your record on that,
 19 Mr. May, now that you know my ruling.

20 MR. MAY: Move it that my record precede the
 21 ruling. There's one thing -- and I understand -- I
 22 guess I will make some record. Number one, I think we
 23 ought to have a legal debate about the meaning of this
 24 contractual language. I think that one of the reasons
 25 that insurance cases get resolved on summary judgment so

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1 often is because when you have undisputed facts -- and I
2 have never heard -- I mean I'm pretty new at this still,
3 but I've never seen a stipulation with so many undisputed
4 facts among the parties. It seems like to me that that
5 would be something that we could -- you know, that that
6 would be more of an issue for the Court than for the
7 jury.

8 The second issue I guess I would raise is -- is
9 that I would ask the Court to, as a matter of law, say
10 that the entire policy is void; even if you're going to
11 submit to the jury the issue of when, if you will, because
12 that is exactly what the policy says. And there's no
13 ambiguity on that part of it.

14 THE COURT: Did you have any record on the -- is
15 that your record on -- you're not asking for directed
16 verdict on fraudulent misrepresentation?

17 MR. MAY: Your Honor, I'm going to move and this
18 is why; because as it was in the paper. I mean he
19 admitted that he had to trick American Family and there's
20 just no reasonable juror who could say he didn't have an
21 intent to deceive it. It doesn't matter what he thought
22 about one year limitations. That's an intent to deceive
23 and he admitted it. And the justified reliance, like I
24 said, he also admitted that he has no complaint about what
25 John Nau did. So there's my motion.

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1 does it really mean to -- to void it and that's why I left
2 the terms of the policy still in there. But I also agree
3 with Mr. May that as a matter of law, the policy was
4 voided. It's just a question of how do you interpret the
5 terms of the policy as to when, and I don't know if it's
6 necessary for me to make that any more explicit in the
7 instructions or not, but I'll think about it.

8 In any event, the Motion for Directed Verdict or
9 motion for judgment on the pleadings is denied.

10 Any additional record that anyone cares to make
11 on any of the motions before we get to the issue of
12 instructions?

13 MR. MAY: I don't think so, Your Honor.

14 MR. RILEY: No, Your Honor.

15 MR. WOODWARD: Motion to reconsider.

16 THE COURT: You see that on TV. They always lay
17 it on the table. I don't know what that means.

18 The record should reflect that I'm going to give
19 counsel at this time my draft of the final jury
20 instructions. What I do is provide the draft of the
21 instructions to counsel; give you an adequate opportunity
22 to review those instructions, and then once you've had a
23 chance to look through them, then we'll get back together
24 and have an instructions conference off the record where
25 we can talk, you know, more freely and have kind of a give

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1 THE COURT: Mr. Riley, you want to make any
2 record?

3 MR. RILEY: Well, he didn't have any complaint
4 with what Mr. Nau did because Mr. Nau paid the claims as
5 they were submitted. But the point is if you get -- I
6 think there is an issue -- a factual issue as to
7 reasonable reliance based on Nau's testimony, but I think
8 there's a factual issue on intent to deceive when you take
9 the testimony of Mr. Niell as a whole, including what he
10 said as to his reasons for doing all of this, so I do
11 think there are factual issues on both of those elements.

12 THE COURT: In viewing the evidence in the light
13 most favorable to the Defendant, the Court concludes that
14 there is a genuine issue of material fact regarding the
15 fraudulent misrepresentation claim and, therefore, that
16 will be submitted to the jury.

17 With respect to the more narrow issue on the
18 contract claim, I'll have to think about the
19 instructions -- and I guess we're going to get to the
20 instructions here in a second -- as to whether or not the
21 jury would be more specifically told. Frankly, initially,
22 I was inclined to instruct the jury that the first three
23 elements of the breach of contract claim had been
24 established except for the damages. But I was sort of
25 persuaded by some of the questioning Mr. Riley did on what

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1 and take. And at that time you can point out any obvious
2 omissions that I have or any typographical errors or that
3 type of thing and you can also argue with me or we can
4 discuss the substance of the instructions as well.

5 Following that conference, then I make some sort
6 of final decisions on what I think the instructions ought
7 to look like and I put them in final form and then I'll
8 provide them to you a second time, and then at that time,
9 we'll go back on the record and you'll make your formal
10 objections and exceptions.

11 Any questions about any of that?

12 MR. MAY: When would you like us back?

13 THE COURT: How long do you want to take? Well,
14 let's do this. I'll give you the instructions now. When
15 each of you are ready, let Lindsey or Karo know and then
16 when everybody is ready, we'll get back at it. I'm hoping
17 it won't take long. Yeah, I think when you look at them,
18 you know, half of them are -- are uniform Eighth Circuit
19 instructions on basic stuff. What you'll see is three
20 marshaling instructions on the three claims that are going
21 to go to the jury and then a few supporting instructions,
22 so there's really only ten instructions you have to really
23 study.

24 All right. That will conclude the record.

25 (Recess at 1:25 p.m., until 2:14 p.m.)

1 (Jury instructions were discussed off the
2 record at this time.)
3 (In open court, outside the presence of the
4 jury.)

5 THE COURT: Let the record reflect that we're in
6 the courtroom and outside the presence of the jury. All
7 counsel are present. The Court has provided counsel with
8 its final jury instructions. Counsel have indicated that
9 they've had an adequate opportunity to review those final
10 jury instructions and are now prepared to take their
11 objections and exceptions.

12 Mr. Proctor or Mr. May?

13 MR. MAY: Your Honor, I'm going to make our
14 objections as such as they are in this format. That we
15 don't have any objections except that we do think the
16 Court should instruct in our favor on all elements of
17 Count One and Count Two; just in -- consistent with our
18 Judgment as a Matter of Law. And I know what the Court's
19 ruling is on that. Just making that clear. And that's
20 the only real objection.

21 I just want to make some record for the future
22 that we would also like to have the Court enter a
23 declaratory judgment with regard to the voiding of the
24 contracts, but that's really separate from this issue of
25 these particular papers. I just wanted to put that on the

1 indicated on the record, that objection is denied.

2 With respect to Instruction No. 6, that portion
3 of the instruction that deals with damages, which is at
4 the bottom of the first page; it starts regarding Element
5 No. 4 of Instruction No. 5. This was the requested
6 instruction by Plaintiff. The Court did not receive a
7 requested instruction by Defendant and, in fact, it wasn't
8 known to me and my impression is it wasn't known to
9 Plaintiff until yesterday during the questioning that the
10 Defendant had some theory as to a measure of damages that
11 was different than what the Plaintiff was proposing.
12 There was no reference to it in Defendant's trial brief;
13 nor was there a reference in the final pretrial order that
14 identified issues; nor was there any instruction
15 submitted.

16 However, I did give Defendant today an
17 opportunity to submit a requested instruction in that
18 regard. The one that was provided -- and I'll just read
19 it here -- says, "Regarding Element No. 4 of Instruction
20 No. blank, the measure of damage is the amount of all
21 payments made by American Family after the date the
22 policies were voided, reduced by the amount of any premium
23 paid by Niell for the policies after the date the policies
24 were voided."

25 The Court believes that that instruction could

1 record. Otherwise, we're fine.

2 THE COURT: So as I understand it, the only
3 objection is to the Court's submission of Counts One and
4 Two to the jury rather than directing a verdict. And for
5 the reasons previously stated, the Court finds that
6 objection should be denied.

7 MR. MAY: That's correct, Your Honor.

8 THE COURT: Mr. Riley?

9 MR. RILEY: Yes. By way of exceptions and
10 objections to the Court's instructions, we would first
11 incorporate our Motion for Directed Verdict made at the
12 close of all the evidence and considered as made at the
13 close of the Plaintiff's evidence and incorporate that
14 herein and state that we, therefore, would object to the
15 submission on any issue where the Court failed to sustain
16 our Motion for Directed Verdict.

17 We would also object to that portion of the
18 final Instruction No. 6 regarding measure of damages on
19 the grounds that it fails to give the jury the opportunity
20 to consider the issue of when the policy was voided and
21 the consequence of that. That would be the extent of the
22 Plaintiff's exceptions to the Court's instructions -- or
23 Defendant's exceptions to the Court's instructions.

24 THE COURT: With respect to the directed verdict
25 objection, for all the reasons the Court previously

1 allow the jury to find that the policies were voided on
2 the date that American Family notified Niell that the
3 policies were voided, which, of course, would eliminate
4 any damage, which I think would be contrary to law and,
5 therefore, the Court is not inclined to submit that
6 instruction.

7 Therefore, the Court will submit the instruction
8 as written and the objection is denied.

9 MR. RILEY: Excuse me, Your Honor. Just so the
10 record is clear, as part of our objection, I think we
11 would have wanted the Court to submit the instruction that
12 the Court just read and I wanted to make sure that our
13 objection encompasses that.

14 THE COURT: Yes. I understood you were making
15 that requested instruction at this time and as I've
16 indicated, that request is denied.

17 Mr. Woodward?

18 MR. WOODWARD: Thank you, Your Honor.

19 Third-party Defendant Throlson, for his objections and
20 exceptions, we would object to the submission of
21 Instruction No. 10 for the reason set forth in our Motion
22 for Directed Verdict, and additionally, the verdict form
23 beginning at question eight for the same reasons.

24 And for our exceptions, we would take exception
25 that the Court has declined to submit Iowa Civil Jury

1 Instruction 100.15 particularly setting forth that
2 Mr. Miell made statements under oath before trial and
3 during trial which were inconsistent and that the jury
4 could use that as a basis to disregard any and all of his
5 testimony, should they so desire.

6 THE COURT: With respect to the first objection,
7 the submission of the negligence claim, essentially with
8 the relating special verdict form, for the reasons stated
9 by the Court when discussing the directed -- the Motion
10 for Directed Verdict, the Court finds that objection
11 should be denied.

12 With respect to the second objection and the
13 Court's failure to include Iowa Uniform Jury Instruction
14 100.15, which -- and I'm paraphrasing here because I don't
15 have it in front of me, but essentially tells the jury if
16 they find that the other party made some statements prior
17 to trial which were inconsistent with statements they made
18 at the time of the trial, they can, but are not required,
19 to disregard the witness' statements made at the time of
20 the trial. The Court believes that that instruction is
21 adequately covered by Instruction No. 3, which says in the
22 first paragraph that you may believe all of what a witness
23 said or only part of it or none of it. And then in
24 paragraph two, it lists the factors which the jury may
25 consider and included in that, one of the factors is

1 the record is that it's being withdrawn?

2 MR. RILEY: Yes.

3 THE COURT: Any additional record, Mr. Proctor
4 or Mr. May?

5 MR. PROCTOR: No, sir.

6 MR. MAY: No, sir.

7 THE COURT: Mr. Woodward?

8 MR. WOODWARD: No, sir.

9 THE COURT: We're going to begin with closing
10 arguments at 9 a.m. on Monday. Pursuant to the local
11 rule, each party will be given up to one hour. The
12 Plaintiff is required to allocate that between its opening
13 argument and rebuttal argument.

14 MR. MAY: Your Honor, just to be clear, do I
15 have to -- you know, with the Iowa Supreme Court, you
16 always have to say how much you want to reserve or can I
17 just go for 18 minutes or 32 minutes and then we keep the
18 rest?

19 THE COURT: I'll keep track of when you start
20 and when you stop and --

21 MR. MAY: Ten-four.

22 THE COURT: -- so if you end up going longer,
23 whatever you do is up to you, but obviously if you go the
24 whole time, you won't have a rebuttal.

25 MR. WOODWARD: Is he going to get to rebut me

1 whether a witness said something different at an earlier
2 time.

3 So counsel is certainly free to refer to the
4 instruction and argue to the jury that the Defendant or
5 any other witness said something at an earlier time which
6 was different and, therefore, you should disregard their
7 testimony. Therefore, that objection will be denied.

8 So all of the objections and exceptions made by
9 counsel are denied. The jury instructions will be
10 submitted as drafted.

11 Any additional record we need to make?

12 MR. PROCTOR: No.

13 MR. RILEY: Yes, Your Honor. Just so the Court
14 understands, I don't know if you saw this, but I had
15 indicated that I might prepare an instruction on the
16 definition of Section -- I think it's 6672, which is the
17 taxing and, in fact, prepared one and it was e-mailed.
18 But in view of the fact that Mr. Miell was able to give
19 testimony as to what taxing meant, such an instruction
20 would not be necessary. But I thought I would mention it
21 because the record would now, I believe, reflect that that
22 instruction -- a proposal of that instruction was
23 electronically filed sometime earlier this afternoon but
24 we're not requesting it at this time.

25 THE COURT: I haven't seen it, but in any event,

1 too?

2 THE COURT: I hadn't thought about that, but I
3 suppose that's right, because he has the burden of proof
4 in that regard. You know, theoretically, I don't know if
5 you're able to separate out your arguments, but
6 theoretically, I think you would be entitled to an hour's
7 argument on -- and I'm talking, of course, to Mr. Riley
8 here for purposes of the record on the Plaintiff's claim
9 and then you would be able to for additional argument on
10 the other claim, because otherwise you are potentially
11 facing two hours of argument and you only have one hour to
12 respond to that.

13 MR. RILEY: Well, with respect to that, and I
14 think that the -- first of all, let's talk about the
15 order. Then we'll talk about the duration. I would think
16 that the appropriate order would be Plaintiff, Defendant,
17 Third-party Defendant, Defendant's reply to the
18 Third-party Defendant, and then American Family is the
19 Plaintiff getting the last word. I would say that that
20 would probably be the appropriate order.

21 MR. WOODWARD: And your scope is limited to
22 rebutting me?

23 MR. RILEY: Right. And, of course, since they
24 will not have -- since American Family would not have said
25 anything since it was just me, then you, then me, there

1 wouldn't be any reason to.

2 In terms of the duration, I -- I -- I guess I
3 would reserve the right if I really feel that I'm in --
4 that I need that time. It's a rare case that you need an
5 hour's argument. I just --

6 THE COURT: Particularly, I can't believe that
7 the issue on this motor vehicle accident is going to take
8 an hour, because either they believe that Miell talked to
9 Throlson about this specifically and Throlson just dropped
10 the ball or they think Miell is making it up and -- and
11 then in addition, I suppose there will be some argument
12 maybe on the damages, but I would hope that neither one of
13 you take an hour talking about that case, frankly.

14 MR. WOODWARD: Well, I can tell you I'm not
15 going to take an hour, Judge.

16 THE COURT: And really even the other case, to
17 some extent, the facts are not hugely in dispute. There's
18 some dispute as to who told what to whom and when, but you
19 know, you have up to an hour. Don't feel like you have to
20 take the whole thing. But as I understand it, the parties
21 generally agree that Plaintiff goes first to argue its
22 case. Mr. Riley will then argue in response to that and
23 will also make an argument in support of his third-party
24 claim. Mr. Woodward will then get up and will argue in
25 favor of Third-Party Defendant. Then Mr. Riley will have

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C E R T I F I C A T E

I, Kay C. Carr, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the proceedings in the above-entitled matter at the time and place indicated.

That I reported in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to print by means of a computer-aided transcription device under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

I further certify that I am not related to or employed by any of the parties to this proceeding, and further that I am not a relative or employee of any attorney of counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand this 1st day of February, 2008.

Kay Carr

Kay C. Carr
Certified Shorthand Reporter
Registered Professional Reporter
Cedar Rapids, Iowa
(319) 362-1543

1 an opportunity to respond only to Mr. Woodward's motor
2 vehicle accident issues. And then Mr. May or Mr. Proctor
3 gets the last word. Does that sound about right?

4 MR. PROCTOR: Sounds fair to me.

5 MR. MAY: Sounds fair.

6 THE COURT: We'll go on the theory that
7 Mr. Riley can get it done in an hour and if Mr. May or
8 Mr. Proctor looks like they're going to take their full
9 time and it turns out you really needed that hour to
10 respond to that and need additional time to look at the
11 motor vehicle thing, I'll be flexible in that regard,
12 because I think it is sort of two separate things, to some
13 extent.

14 MR. RILEY: That's fine.

15 THE COURT: Anything else we need to talk about
16 then?

17 MR. PROCTOR: I would like one question, but not
18 on the record.

19 THE COURT: That will conclude the record.

20 (This concludes the requested, excerpted
21 portion of the record.)
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